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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 19

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

CLARA BELLE HENNING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 06, 1951
CERTIORARI GRANTED JANUARY 28, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 456

THE UNITED STATES OF AMERICA, PETITIONER

vs.

CLARA BELLE HENNING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

In United States District Court for the District of Massachusetts

No. 7917 Civil Action

CLARA BELLE HENNING, PLAINTIFF

vs.

UNITED STATES OF AMERICA ET AL., DEFENDANT

Docket entries

1948

Oct. 14—$15 Complaint filed.
14—Plaintiff's claim for trial by jury filed.
14—Summons issued.
18—Sums. retd. by Marshal, served Oct. 15, 1948, filed.
Dec. 10—Deft.'s answer and counterclaim for interpleader filed.
Dec. 10—FORD, J. Order joining Bessie M. Henning as additional party deft. Order filed.
10—Sums. issued directed to Bessie M. Henning, Interpleader defendant.

1949

Jan. 4—Sums. retd. by Marshal, served Dec. 28, 1948, filed.
7—Answer of Bessie M. Henning filed.
24—Appearance of Philip T. Jones, Asst. U. S. Atty. for deft. filed.
Aug. 18—Defendant's motion to strike answer of Interpleader defendant, filed.
Dec. 21—FORD, J. Case pretried. Pretrial Memo filed.

1950

Jan. 9—WYZANSKI, J. Motion to strike answer of Interpleader defendant allowed to be withdrawn.
9—Motion to amend complaint filed by Clara Belle Henning.
9—WYZANSKI, J. Motion to amend complaint allowed.
Aug. 9—Defendant's answer to amended complaint, filed.
Oct. 17—WYZANSKI, J. Oral waiver of jury trial by parties in open court.
17—WYZANSKI, J. Trial without jury begins, stipulation of facts filed; evidence; amended answer to be filed by Administrator of the Estate of Bessie Henning; evidence; argument on behalf of Administrator; findings of fact and conclusions of law dictated in open court; ORDERED decree to be drawn awarding sums due from July 4, 1945 to Dec. 5, 1945 to father, Otto Henning, from Dec. 9, 1945 to July 30, 1949 to

Bessie Henning and Clara Henning equally, from July 1, 1949 to Clara Henning; provision by agreement or by further order of Court to be made for counsel fees.

17—Answer of Joseph S. Kennedy, Administrator, filed.

18—WYZANSKI, J. MEMORANDUM OF OPINION.

1951

Jan. 12—WYZANSKI, J. JUDGMENT, in accordance with the memorandum dated October 17, 1950, as follows:

(1) That Joseph S. Kennedy, as administrator of the estate of Otto F. Henning, do have and recover of and from the defendant, the United States of America, $500;

(2) That the plaintiff Clara Belle Henning, and Joseph S. Kennedy, as administrator of the estate of Bessie M. Henning, do have and recover of and from the defendant, the United States of America, in equal shares, $3,500;

(3) That the plaintiff, Clara Belle Henning, do have and recover of and from the defendant, the United States of America, $1,583.33, being the amount of the next nineteen monthly installments of death benefits payable thereunder commencing July 4, 1949, until January 4, 1951, being the last anniversary date preceding the date this judgment is entered and also the amounts of $83.33 to be paid on the fourth day of each of the 53 months following the date of this judgment, that is, 53 months beginning February 4, 1951, provided that payment on each of those dates shall be contingent on the said Clara Belle Henning being alive that date;

(4) That the defendant, the United States of America, deduct $50, being 10% of the total sum paid to the administrator of the estate of Otto F. Henning under the said policy by virtue of and pursuant to this judgment and pay the same to Richard H. Lee, Esquire, for services rendered in this cause;

(5) That the defendant, the United States of America, deduct $175, being 10% of the total sum paid to the administrator of the estate of Bessie M. Henning under the said policy by virtue of and pursuant to this judgment and pay the same to Richard H. Lee, Esquire, for services rendered in this cause;

(6) That the defendant, the United States of America, deduct $175 plus $158.33, being 10% of the total sum of the insurance benefits which have accrued to

Clara Belle Henning, plaintiff, to date, and also 10% of any and all future benefits which may hereafter be paid to her by virtue of and pursuant to paragraph 3 of this judgment and pay same to Frederick Breen, Esquire, her attorney, for services rendered in this cause. Judgment filed. Copies mailed to counsel.

Jan. 22—Motion of the United States of America for new trial filed.

22—WYZANSKI, J. Motion of the United States of America for new trial denied. Counsel notified Jan. 22, 1951.

31—Notice of Appeal filed by defendant, United States; copy mailed February 2, 1951, to Richard H. Lee, 27 State Street, Boston, for Interpleaded Defendant; copy mailed to Frederick Breen, 412 Barristers Hall, Boston, for plaintiff.

Mar. 1—Designation of Contents of Record filed by appellant.

1—Statement of Points filed by appellant.

8—Motion for extension of time for filing record and docketing appeal, filed by appellant.

12—WYZANSKI, J. Ordered time for docketing appeal be extended to and including April 11, 1951, end of 70-day period.

In United States District Court

Complaint

Filed October 14, 1948

1. This is an action arising under the laws of the United States, U. S. C. A., Title 38, Section 817.

2. The full name of the plaintiff is Clara Belle Henning, and her address is 74 Williams Street, Jamaica Plain, Boston, within the District of Massachusetts.

3. The plaintiff was the mother of one Eugene Charles Henning, who was born on September 20, 1912 and died on July 4, 1945 while he was on active duty with the United States Naval Reserve.

4. A policy of National Service Life Insurance on the life of the said Eugene Charles Henning in the sum of ten thousand (10,000) dollars was issued effective December 1943 as claimed by XC-4-139-617; the said Eugene Charles Henning designated as sole beneficiary of this policy his wife, Mabel Evelyn Henning as principal beneficiary and his father, Otto Henning as contingent beneficiary. Shortly thereafter, his marriage to Mabel Evelyn Henning was annulled. His father Otto Henning died on December 8, 1945, before any payments of insurance were made to him and his stepmother, Bessie M. Henning, who resides at

76 Needham Street, Dedham, Massachusetts, claiming as loco parentis towards him as the last person to bear the relation of mother during his minority, claims the proceeds of this policy.

5. The said Bessie M. Henning was not within the degree or nature of relationship permitted to be a beneficiary of such a policy by the provisions of The National Service Life Insurance Act of 1940, as amended; and she did not stand in loco parentis to the insured for a period of not less than one year prior to his entry into active service.

6. The Veterans' Administration approved an award for the benefit of the insurance to the said Bessie M. Henning as of August 17, 1948; subsequently, the plaintiff contested the payments to the said Bessie M. Henning on the grounds that the policy could not be legally payable to her.

7. The plaintiff submitted evidence to the Veterans' Administration that the said Bessie M. Henning at no time stood in loco parentis to the said Eugene Charles Henning.

8. Despite the evidence submitted by the plaintiff, the Veterans' Administration by letter dated August 17, 1948 advised the plaintiff that a decision had been rendered whereby the claim of the plaintiff was denied and the claim of Bessie M. Henning was allowed: Therefore, a "disagreement" exists within the meaning of the U. S. C. A., Title 38, Section 817.

9. Upon a determination that the policy on the life of Eugene Charles Henning is not payable to Bessie M. Henning, the plaintiff will be entitled to the entire benefits therefor under the provisions of the National Life Insurance Act as the insured left no widow or children and his father has deceased.

Wherefore, the plaintiff respectfully prays that this Honorable Court:

1. Determine that Bessie M. Henning did not stand in loco parentis to Eugene Charles Henning prior to his entry into armed service,

2. Order that the full proceeds of the ten thousand (10,000) dollars policy of the National Service Life Insurance upon the said Eugene Charles Henning be paid to the plaintiff;

3. Order that reasonable attorney's fees be allowed to the plaintiff;

4. Grant such other relief as it may deem necessary and proper; and

5. Enter a judgment upon the facts and the law.

FREDERICK BREEN,
412 Barristers Hall, Boston, Mass.

In United States District Court

Answer and counterclaim for interpleader

Filed December 10, 1948

Now comes the defendant, the United States of America, by William T. McCarthy, United States Attorney, and Philip T. Jones, Assistant United States Attorney, in and for the District of Massachusetts, and for answer to the complaint filed herein says:

I

This defendant admits the allegation contained in paragraph 1 of the complaint.

II

This defendant, upon information and belief, admits the allegations contained in paragraphs 2 and 3 of the complaint.

III

Answering paragraph 4 of the complaint, this defendant admits that Eugene Charles Henning, hereinafter referred to as the insured, while in the military service, applied for and was granted, effective December 1, 1942, a contract of National Service Life Insurance, policy No. N-8 274 885, in the amount of $10,000, in which he named as principal beneficiary Mabel Evelyn Henning, described as wife, and as contingent beneficiary Otto Henning, described as father; that thereafter the insured executed Veterans Administration Insurance Form 336, on the 27th day of July, 1944, in which he cancelled all previous designations of beneficiaries under the said policy and named as principal beneficiary Otto Henning, described as father, for the full amount of the said insurance and in which no contingent beneficiary was named; that the premiums on the said policy were paid to include the month of July 1945; that the insured died July 4, 1945; that Otto Ferdinand Henning, who is the same person as Otto Henning, father of the insured, died December 8, 1945; that the Judge of Probate at Dedham, in and for the County of Norfolk, Commonwealth of Massachusetts, entered a decree on the 16th day of October 1944, upon the petition of Eugene Charles Henning, annulling the marriage ceremony between the said Eugene Charles Henning and Mabel Evelyn Hathaway Henning and declaring it null and void for the reason that the said Mabel Evelyn Hathaway Henning was legally incompetent to contract a valid marriage; that, subsequent to the death of the said Otto Ferdinand Henning,

Clara Belle Henning filed in the Veterans Administration on February 4, 1946, Veterans Administration Insurance Form 1557, Affidavit of Relationship, alleging that she was the mother of the insured; that Bessie M. Henning filed in the Veterans Administration on February 14, 1946, Veterans Administration Insurance Form 1557, Affidavit of Relationship, alleging that she was the foster mother of the insured and that she stood in loco parentis to the insured within the meaning of that term as defined in Section 802 (f), Title 38, U. S. C. A. This defendant admits, upon information and belief, that the said Bessie M. Henning resides at 76 Needham Street, Dedham, Massachusetts, and that, as the person who last bore the relationship of mother to the insured during his minority, she claims the proceeds of this policy. Except as admitted herein, the allegations of this paragraph are denied.

IV

This defendant denies the allegations contained in paragraph 5 of the complaint.

V

This defendant denies the allegations contained in paragraph 6 of the complaint. Further answering, this defendant says that the Veterans Administration has held that Bessie M. Henning stood in loco parentis to the insured during his minority and was the last person to bear the relationship of mother to him during this period and prior to his entry into the military service. This defendant admits that the plaintiff has contested this finding and the payment of the proceeds of the policy of insurance involved in this action to Bessie M. Henning. It is denied that the Veterans Administration has approved an award of the proceeds of the policy to the said Bessie M. Henning, and says that no award of benefits has been made to the said Bessie M. Henning, and that no payment will be made to her pending the termination of this litigation.

VI

This defendant denies the allegations contained in paragraph 7 of the complaint, but says that the plaintiff submitted some evidence to the Veterans Administration tending to show that the said Bessie M. Henning at no time stood in loco parentis to the insured.

VII

This defendant admits the allegations contained in paragraphs 8 and 9 of the complaint.

This defendant denies each and every allegation of the complaint not herein specifically admitted.

COUNTER-CLAIM FOR INTERPLEADER

Further answering herein by way of counter-claim for interpleader, this defendant adopts and incorporates herein as fully as if restated the allegations of fact admitted and set forth in paragraphs I–VII, inclusive, of this answer, and says that by reason of the conflicting claims of the plaintiff, Clara Belle Henning, and Bessie M. Henning a substantial question has arisen and now exists as to whether this defendant, the United States of America, is obligated to pay the insurance benefits to Clara Belle Henning or to Bessie M. Henning. This defendant further says that in order to avoid a multiplicity of suits for the said insurance benefits and a possible subjection of this defendant to double liability, it is essential that the court determine in this action whether the defendant, the United States of America, is obligated to pay the insurance benefits under the National Service Life Insurance contract involved in this action to Clara Belle Henning or to Bessie M. Henning, and for this purpose the defendant says that Bessie M. Henning is an indispensable party to the action.

Wherefore the defendant prays:

1. That Bessie M. Henning, whose address is 76 Needham Street, Dedham, Massachusetts, be joined as a party-defendant in this action as provided by Section 19 of the World War Veterans Act of 1924, as amended (Section 445, Title 38, U. S. C. A.), and that she be cited to appear and answer herein in such manner as the court may direct and upon final hearing the court direct this defendant, the United States of America, as to the person entitled to receive the monthly installments under the contract of insurance involved in this action.

2. That the court discharge this defendant from any and all liability in the premises, except to the person who shall be adjudged entitled to receive the benefits of the said insurance policy.

3. For its costs and for such other and further relief as to the court may seem just and proper.

WILLIAM T. MCCARTHY,
United States Attorney.

PHILIP T. JONES,
Assistant U. S. Attorney.

In United States District Court

Order joining additional party-defendant

December 10, 1948

Upon consideration of the answer of the defendant, the United States of America, and its prayer that Bessie M. Henning be joined as a party-defendant herein, and it appearing to the court that unless the conflicting interests of the plaintiff, Clara Belle Henning, and Bessie M. Henning are now judicially determined, the United States of America may be subjected to further litigation and possible double liability.

It is ordered, that in accordance with the provisions of Section 19, World War Veterans Act, 1924, as amended, and Rules 13 (h). and 22 of the Federal Rules of Civil Procedure, Bessie M. Henning be made a party-defendant in this action, and

It is further ordered, that a certified copy of the complaint filed herein, together with a certified copy of the defendant's answer and counter-claim, and a certified copy of this order, as well as a summons requiring the said Bessie M. Henning to appear in this court in answer to the suit within 20 days after service of said summons, complaint, and order, be personally served on the said Bessie M. Henning by the United States Marshal in and for the District of Massachusetts as provided by law.

This tenth day of December 1948.

FRANCIS J. W. FORD,
United States District Judge.

In United States District Court

Answer of Bessie M. Henning

Filed January 7, 1949

Now comes Bessie M. Henning, interpleader defendant, of Dedham, in said District of Massachusetts, and makes answer to the complaint of Clara Belle Henning and the counterclaim for interpleader of the United States of America as follows:

1. The defendant admits the allegations of paragraph 1 of the complaint.

2. The defendant admits the allegations of paragraph 2 of the complaint.

3. The defendant admits that Clara Belle Henning was the natural mother of Eugene Charles Henning and that said Eugene Charles Henning was born September 20, 1912 and died July 4, 1945 while on active duty with the United States Navy.

4. In answer to paragraph 4 of the complaint the defendant admits that a policy of National Service Life Insurance was issued to Eugene Charles Henning in the sum of ten thousand (10,000) dollars, effective December 1942, Certificate No. N–8 274 885; that the said Henning designated his then wife, Mabel Evelyn Henning, as principal beneficiary; and his father, Otto F. Henning, also known as Otto Henning, as contingent beneficiary; that thereafter and during the lifetime of Eugene Charles Henning his marriage to Mabel Evelyn Henning was annulled and Eugene Charles Henning notified the Veterans Administration to change the beneficiary from Mabel Evelyn Henning to Otto F. Henning; that at the time of the death of the insured, Eugene Charles Henning, his father, Otto Henning, was living and was the beneficiary of his insurance. This defendant further admits that the said Otto Henning, beneficiary, died on December 8, 1945 before any payments were made to him and that this defendant, Bessie M. Henning, resides at 76 Needham Street, Dedham and claims the proceeds of this policy, as the person in loco parentis toward the deceased and as the last person to bear relation of mother to him during his minority and an administratrix of the estate of Otto F. Henning.

5. The defendant denies that she was not within the degree or nature of relationship permitted to be a beneficiary by the provisions of The National Service Life Insurance Act of 1940, as amended, and further denies that she did not stand in loco parentis to the insured, and the defendant says that from September 3, 1927 until the enlistment of the defendant in 1942 and until his entry into active service she bore the relation of mother to the deceased.

6. The defendant admits the allegations of paragraph 6 of the complaint.

7. The defendant denies the allegations of paragraph 7 of the complaint and further says that no conclusive evidence has been submitted by any party proving that the said Bessie M. Henning at no time stood in loco parentis to Eugene Charles Henning.

8. The defendant admits that the Veterans Administration advised the plaintiff of a decision in favor of Bessie M. Henning on August 17, 1948 as to whether a disagreement exists within the meaning of the U. S. C. A., Title 38, Section 817, the defendant leaves the plaintiff to her proof.

9. The defendant admits that the insured, Eugene Charles Henning, left no widow or children, and that his stated beneficiary, his father Otto Henning, died December 8, 1945. As to the other allegations of paragraph 9, the defendant denies them.

10. In answer to the counterclaim for interpleader of United States of America, the defendant admits that by reason of the

conflicting claims of the plaintiff, Clara Belle Henning, and the defendant, Bessie M. Henning, a question has arisen as to whom the United States of America should pay the insurance benefits and admits that this defendant Bessie M. Henning is an indispensable party to the suit.

11. And the defendant say that the plaintiff, Clara Belle Henning, was divorced from her former husband, Otto F. Henning, by decree of the Superior Court for Norfolk County, Commonwealth of Massachusetts, on the 8th day of February 1923, No. 2676, in which Otto F. Henning, the husband, was libellant and the court found said Clara Belle Henning guilty of cruel and abusive treatment and awarded the care and custody of Eugene Charles Henning, then a minor child, to said Otto F. Henning; and that at no time subsequent to said February 8, 1923 did Clara Belle Henning bear the relation of mother to the said Eugene Charles Henning; that on September 3, 1927 the defendant Bessie M. Henning married Otto F. Henning, who was then the father and natural guardian of Eugene Charles Henning and the person entitled to his custody; and that during the period from September 3, 1927 until the death of the said Eugene Charles Henning the defendant Bessie M. Henning continued to bear the relationship of mother toward the insured, and that she gave him counsel and advice and furnished him with his meals, did his washing, ironing and mending, during the greater part of that period, and that the said Eugene Charles Henning consulted her, wrote her and showed affection for her and confidence in her as his foster mother; that upon going into the service he left his furniture and civilian clothes with her and continued to regard her in loco parentis.

Wherefore, the defendant prays:

1. That the Court determine that Bessie M. Henning stood in loco parentis to Eugene Charles Henning at the time of his entry into the service of the United States and that she bore the relation of mother to him for a period of more than a year prior to such entry;

2. That the Court determine that Bessie M. Henning is the administratrix of the estate of Otto F. Henning, also known as Otto Henning, who was the father and named beneficiary of the insured at the date of death of the insured;

3. That the Court order that the proceeds of the policy of National Service Life Insurance issued upon the life of Eugene Charles Henning, No. N– 8 274 885, effective December 1, 1942, in the amount of $10,000.00 be paid to the defendant Bessie M. Henning as beneficiary.

4. That a reasonable attorney's fee be allowed to the defendant Bessie M. Henning, together with her costs and such other relief as may seem just and proper to the Court.

By her attorney:

RICHARD H. LEE,
BLAKEMORE & LEE.

In United States District Court

Motion to strike answer of interpleader-defendant

Filed August 18, 1949

And now comes the defendant, the United States of America, by George F. Garrity, United States Attorney, in and for the District of Massachusetts, and notes on the record the fact that the interpleader-defendant, Bessie M. Henning, of Dedham, in the District of Massachusetts, died on June 30, 1949, as attested to by the death certificate attached hereto and therefore moves that the Answer of the said Bessie M. Henning be stricken from the record.

GEORGE F. GARRITY,
United States Attorney.
By PHILIP T. JONES,
Assistant United States Attorney.

Not pressed. Allowed to be withdrawn. WYZANSKI, J., Jan. 9, 1950.

COMMONWEALTH OF MASSACHUSETTS

CERTIFICATE OF DEATH

From the Records of Deaths in the

TOWN OF DEDHAM, MASSACHUSETTS

1. Date of Death—June 30, 1949.
2. Name—Bessie Henning.
   (Maid Name)—Bessie Gass.
3. Sex—Female.
   and whether Single, Married or Widowed—Widowed.
4. Color—White.
5. Age—57 Years, -- Month, -- Days.
6. Disease or Cause of Death—Arteriosclerotic heart disease and burns from fall on stove.
7. Residence—Dedham, Massachusetts.
8. Occupation—None.
9. Place of Death—Boston, Massachusetts.
10. Place of Birth—Dedham, Massachusetts.

11. Name of Husband or Wife—Otto F. Henning.
12. Name of Father—Daniel E. Glass.
13. Maiden Name of Mother—Sarah Dickson.
14. Birthplace of Father—Canada.
15. Birthplace of Mother—Canada.
16. Place of Interment—Brookdale Cemetery, Dedham, Massachusetts.

I, John T. Carey, depose and say that I hold the office of Town Clerk of the Town of Dedham in the County of Norfolk and Commonwealth of Massachusetts; that the records of Births, Marriages and Deaths required by law to be kept in said Town are in my custody, and that the above is a true extract from the records of Deaths in said Town, as certified by me.

Witness my hand and the seal of said Town, on the 17th day of August, 1949.

JOHN T. CAREY,
Town Clerk.

MEMORANDUM: The foregoing motion filed by defendant, United States, not being pressed, was allowed to be withdrawn by the Court, WYZANSKI, J., as appears endorsed thereon.

JOHN A. CANAVAN, *Clerk.*

In United States District Court

Motion to amend complaint

Filed January 9, 1950

And now comes the plaintiff, Clara Belle Henning, and notes on the record the fact that the interpleader-defendant, Bessie M. Henning, of Dedham, in the District of Massachusetts, died on June 30, 1949 and therefore moves that she be allowed to amend her complaint.

CLARA BELLE HENNING,
By FREDERICK BREEN,
Her Attorney.

Allowed. WYZANSKI, J. Jan. 9, 1950.

In United States District Court

Amended complaint

Filed January 9, 1950

1. This is an action arising under the laws of the United States, U. S. C. A., Title 38, Section 817.

2. The full name of the plaintiff is Clara Belle Henning, and her address is 74 Williams Street, Jamaica Plains, Boston, within the District of Massachusetts.

4. The plaintiff was the mother of one Eugene Charles Henning, who was born on September 20, 1912 and died on July 4, 1945, while he was on active duty with the United States Naval Reserve.

4. A policy of National Service Life Insurance on the life of the said Eugene Charles Henning in the sum of ten thousand dollars ($10,000), effective December 1942, Certificate No. N-8274-885; the said Eugene Charles Henning designated as sole beneficiary of this policy his wife, Mabel Evelyn Henning as principal beneficiary and his father, Otto Henning as contingent beneficiary. Shortly thereafter, his marriage to Mabel Evelyn Henning was annulled. His father Otto Henning died on December 8, 1945, before any payments of insurance were made to him and his stepmother Bessie M. Henning, who resided at 76 Needham Street, Dedham, Massachusetts, and who claimed the proceeds of this policy.

5. The said Bessie M. Henning was not within the degree or nature of relationship permitted to be a beneficiary of such a policy by the provisions of The National Service Life Insurance Act of 1940, as amended; and she did not stand in loco parentis to the insured for a period of not less than one year prior to his entry into active service.

6. The Veterans Administration approved an award for the benefit of the insurance to the said Bessie M. Henning as of August 17, 1948; subsequently, the plaintiff contested the payments to the said Bessie M. Henning on the grounds that the policy could not be legally payable to her.

7. The plaintiff submitted evidence to the Veterans Administration that the said Bessie M. Henning at no time stood in loco parentis to the said Eugene Charles Henning.

8. Despite the evidence submitted by the plaintiff, the Veterans Administration by letter dated August 17, 1948 advised the plaintiff that a decision had been rendered whereby the claim of the plaintiff was denied and the claim of Bessie M. Henning was allowed: Therefore, a "disagreement" existed within the meaning of the U. S. C. A., Title 38, Section 817.

9. Upon a determination that the policy on the life of Eugene Charles Henning is not payable to Bessie M. Henning on the ground that she did not stand in loco parentis and she was not the last person to bear the relationship of mother toward the insured, and that Bessie M. Henning has deceased before receiving any of the said benefits therefore under the provisions of The National Life Insurance Act as the insured left no widow, or

children, and his father has deceased and the plaintiff being the only living parent of the said Eugene Charles Henning and never having relinquished her rights and obligations will be entitled to the benefits of The National Life Insurance Act as the natural mother of Eugene Charles Henning.

Wherefore, the plaintiff respectfully prays that this Honorable Court:

1. Determine that Bessie M. Henning did not stand in loco parentis to Eugene Charles Henning prior to his entry into armed service or in the alternative determine that the plaintiff being the only living natural parent of the said Eugene Charles Henning has never relinquished her parental rights and obligations;

2. Order that the full proceeds of the ten thousand dollar ($10,000) policy of the National Service Life Insurance upon the said Eugene Charles Henning be paid to the plaintiff;

3. Order that reasonable attorney's fees be allowed to the plaintiff;

4. Grant such other relief as it may deem necessary and proper, and

5. Enter a judgment upon the facts and the law.

In United States District Court

Answer to Amended Complaint

Filed August 9, 1950

Now comes the defendant, the United States of America, by George F. Garrity, United States Attorney in and for the District of Massachusetts, and for answer to the amended complaint filed herein says:

I

The defendant hereby denies each and every allegation of said complaint not herein specifically admitted, qualified, or otherwise denied.

II

The defendant admits the allegations contained in paragraph one of said complaint.

III

The defendant, upon information and belief, admits the allegations contained in paragraph two of said complaint.

IV

The defendant, upon information and belief, admits the allegations contained in paragraph three of said complaint.

V

Answering paragraph four of said complaint, the defendant admits that Eugene Charles Henning, hereinafter referred to as the insured, while in the military service applied for and was granted, effective December 1, 1942, a contract of National Service Life Insurance, policy No. N-8274885, in the amount of $10,000.00, in which he named as principal beneficiary Mabel Evelyn Henning, described as wife, and as contingent beneficiary, Otto Henning, described as father; that thereafter the insured executed Veterans Administration Form 336 on the 27th day of July 1944, in which he cancelled all previous designations of beneficiaries under the said policy and named as principal beneficiary, Otto Henning, described as father, for the full amount of the said insurance and in which no contingent beneficiary was named; that the premiums on the said policy were paid to include the month of July 1945; that the insured died July 4, 1945; that Otto Ferdinand Henning, who is the same person as Otto Henning, father of the insured, died December 8, 1945; that the judge of Probate at Dedham, in and for the County of Norfolk, Commonwealth of Massachusetts, entered a decree on the 16th day of October 1944, upon the petition of Eugene Charles Henning, annulling the marriage ceremony between the said Eugene Charles Henning and Mabel Evelyn Hathaway Henning and declaring it null and void for the reason that the said Mabel Evelyn Hathaway Henning was legally incompetent to contract a valid marriage; that subsequent to the death of the said Otto Ferdinand Henning, Clara Belle Henning filed in the Veterans Administration on February 4, 1946 Veterans Administration Insurance Form 1557, Affidavit of Relationship, alleging that she was the mother of the insured; that Bessie M. Henning filed in the Veterans Administration on February 14, 1946, Veterans Administration Insurance Form 1557, Affidavit of Relationship, alleging that she was the foster mother of the insured and that she stood in loco parentis to the insured within the meaning of that term as defined in Section 802 (f), Title 38, U. S. C. A. This defendant admits, upon information and belief, that the said Bessie M. Henning resided at 76 Needham Street, Dedham, Massachusetts, and that she claimed the proceeds of this policy as the person who last bore the relationship of mother to the insured during his minority.

Except as admitted herein, the allegations of this paragraph are denied.

VI

The defendant denies the allegations contained in paragraph five of said complaint.

VII

The defendant denies the allegations contained in paragraph six of said complaint. Further answering, the defendant says that the Veterans Administration held that Bessie M. Henning stood in loco parentis to the insured during his minority and was the last person to bear the relationship of mother to him during this period and prior to his entry into the military service. This defendant admits that the plaintiff has contested this finding of the payment of the proceeds of the policy of insurance involved in this action to Bessie M. Henning. Defendant denies that the Veterans Administration has approved an award of the proceeds of the policy to the said Bessie M. Henning and says that no award of benefits has been made to the said Bessie M. Henning and that no payment will be made to the estate of Bessie M. Henning pending the termination of this litigation.

VIII

The defendant denies the allegations contained in paragraph seven of said complaint but says that the plaintiff submitted some evidence to the Veterans Administration tending to show that the said Bessie M. Henning at no time stood in loco parentis to the insured.

IX

The defendant admits the allegations contained in paragraph eight of said complaint.

X

Answering the allegations contained in paragraph nine of said complaint, this defendant admits that Bessie M. Henning has deceased before receiving any of the said benefits under the policy of insurance in suit, but denies all other allegations contained in said paragraph.

Further answering the allegations contained in the plaintiff's amended complaint, this defendant states that Clara Belle Henning relinquished her rights and obligations as mother of Eugene Charles Henning during his minority and that Bessie M. Henning stood in the relationship of parent within the meaning of that term as defined in Section 802 (f), Title 38, U. S. C. A. and was

the last person to stand in the relationship of parent to the deceased, Eugene Charles Henning, that Bessie M. Henning has deceased before any payment of benefits under said policy was made to her, that no payments of benefits is permitted to be made to her estate under the provisions of the National Service Life Insurance Act and that Clara Belle Henning is not within the permitted class of beneficiaries to receive benefits under the policy of insurance in suit.

Wherefore, this defendant prays the court to enter judgment for this defendant, the United States of America.

GEORGE F. GARRITY,
United States Attorney.
By PHILIP T. JONES,
Assistant U. S. Attorney.

In United States District Court

Answer of Joseph S. Kennedy, Administrator

Filed October 17, 1950

Now comes Joseph S. Kennedy of Dedham, Massachusetts, and states that the defendant in interpleader, Bessie M. Henning, who previously filed an answer in this case on January 4, 1949, died on June 30, 1949, and that he, the said Joseph S. Kennedy, was appointed administrator of the Estate of Bessie M. Henning on August 17, 1949, by the Probate Court for Norfolk County, Case No. 119666, and that he prosecutes this claim on behalf of the Estate of Bessie M. Henning, and for answer to the amended complaint he wishes to adopt the answers previously filed by the said Bessie M. Henning in January 1949, and asks that the prayers attached to said answer be adopted as the prayers of the defendant Kennedy, Administrator.

By his attorney:

RICHARD H. LEE.

Filed October 17, 1950, by leave of Court.

In United States District Court

Stipulation of facts

Filed October 17, 1950

The parties herein hereby stipulate and agree that the following facts are true and may be submitted to the jury without formal proof:

1. That on September 20, 1912, Eugene C. Henning was born, the son of Otto F. and Clara B. Henning, at Boston, Massachusetts.

2. That on August 9, 1923, Otto F. and Clara B. Henning were divorced by decree of the Judge of the Superior Court of Norfolk County on the libel of Otto F. Henning charging cruel and abusive treatment, the care and custody of their minor child, Eugene C. Henning, being awarded to Otto F. Henning.

3. That on September 3, 1927, Otto F. Henning and Bessie M. Gass were married at Dedham, Massachusetts.

4. That on January 27, 1940, Eugene C. Henning and Mabel Evelyn Hathaway were married at Nashua, New Hampshire.

5. That on November 11, 1942, Eugene C. Henning entered upon active duty in the United States Navy.

6. That on December 1, 1942, a policy of National Service Life Insurance was issued on the life of Eugene C. Henning, naming his wife, Mabel Henning, as beneficiary and his father, Otto F. Henning, as contingent beneficiary.

7. That on July 27, 1944, Eugene C. Henning executed change of beneficiary form #336, naming Otto F. Henning, father, as beneficiary, but no contingent beneficiary.

8. That on October 16, 1944, the marriage of Eugene C. and Mabel H. Henning was annulled by decree of the Probate Court for Norfolk County, Massachusetts.

9. That on July 4, 1945, Eugene C. Henning died at Davisville, Rhode Island, while a member of the Armed Services.

10. That on December 8, 1945, Otto F. Henning died at Boston, Massachusetts.

11. That on February 4, 1946, the plaintiff Clara Belle Henning filed in the Veterans Administration a Veterans Administration Insurance Form 1557, alleging that she was the mother of the insured.

12. That on February 14, 1946, the interpleader defendant, Bessie M. Henning, filed in the Veterans Administration a Veterans Administration Insurance Form 1557, alleging that she was the foster-mother of the insured and that she stood in loco parentis to the insured within the meaning of that term as defined in Section 802 (f), Title 38, U. S. Code.

13. That on September 3, 1947, it was determined by the Veterans Administration that the claimant Clara B. Henning, the natural mother of the insured, be found to have last stood in loco parentis to the insured for a period of at least one year beginning during his minority prior to his entry into active service, and that the claim of Bessie M. Henning be disallowed.

14. That on August 17, 1948, the Board of Veterans Appeals decided that the veteran's step-mother, Mrs. Bessie M. Henning, stood in loco parentis to the insured and was the last person to

bear the relation of mother during his minority and prior to his entering into the military service.

15. That the decision of the Board of Veterans Appeals constituted a final administrative disallowance of the claim of Clara B. Henning for insurance benefits.

16. That a disagreement exists as to the claims arising under the National Service Life Insurance Act and that this Court has jurisdiction over this action.

Respectfully,

FREDERICK BRUEN,
Attorney for the Plaintiff;
GEORGE F. GARRITY,
United States Attorney,
By PHILIP T. JONES,
Assistant U. S. Attorney; Attorney for the Defendant.

On October 17, 1950, after oral waiver of jury trial by the parties in open court, trial began before the court, WYZANSKI, J., without jury, upon the pleadings and evidence and the foregoing stipulation of facts. After full hearing, and argument on behalf of the Administrator of Estate of Bessie Henning, the following findings of fact and conclusions were dictated in open court:

In United States District Court

Memorandum of Opinion

October 17, 1950

A jury having been waived, I shall dictate my findings and conclusions.

The question at issue in this case is who if anyone, shall receive the proceeds of a policy of national life insurance for $10,000 issued on the life of Eugene C. Henning, a service man, who died on active service on July 4, 1945.

There are three principal claimants:—first, the claim of the representative of the father of the service man; second, the claim of the mother of the service man; and third, the claim of the representative of the stepmother of the service man. In one sense this first claim just referred to has not been formally presented to the Court because there is not now living any representative or any administrator d. b. n. p. a., of the deceased father of the service man. However, I deem it appropriate, in view of the form of judgment which must be entered in this case, to take that claim into account as though it were presented and to give a reasonable period of time for application to be made to the Probate Court of

Massachusetts for the appointment of such an administrator d. b. n. p. a., and to allow such person, if appointed, to file a formal pleading in this Court prior to the entry of a judgment.

In stating the facts it will be most convenient first to point out that after Eugene died in active service on July 4, 1945, his father Otto, died on December 8, 1945, and his stepmother died on June 30, 1949. I have already pointed out that there was a problem with respect to the representative of Otto. Although after his death his widow, Bessie, was named as administratrix, she died on June 30, 1949, before she had fully administered the estate.

With regard to the claim of the stepmother, Bessie, it is important to recognize that she herself died on June 30, 1949. A Mr. Kennedy was appointed and is still serving as the administrator of her estate, but has not yet filed an amended claim, but it is understood that such a claim will be duly pleaded within the next forty-eight hours and I shall regard the pleading as though it had been filed before I dictated this memorandum.

It now is appropriate to turn to the facts with regard to the service man's relationship to the three persons, the father, the mother, and the stepmother, who either through themselves or their representatives have presented or will present claims to this Court. Eugene Charles Henning was born September 20, 1912. He was the son of Otto F. Henning and Clara Belle Henning. They seem to have separated at the time of his birth. At any rate between 1912 and about 1920 the service man and his mother lived together in the home of the maternal grandmother. During this time the support of the service man developed entirely upon the maternal side of the family.

About 1920, when the service man was about eight years of age, he went to the home of his paternal grandmother, Mrs. Henning. While he was with her she received from his mother for his account some financial assistance. I am not inclined to believe that it was quite so much as $100 a year which the mother says that she gave to her mother-in-law, but I do not regard this as a very material point.

About 1922 the service man moved to the home of a cousin on the Henning side of the family named at that time Mrs. Schacht, now known as Mrs. Schaller. The service man lived with Mrs. Schacht from the day before Thanksgiving of 1922 until about the fall of 1926.

While the service man was at his maternal grandmother's home on February 8, 1923, his father, Otto, and his mother, Clara Belle, were divorced by a decree of the Probate Court of Norfolk County in the Commonwealth of Massachusetts. It was one of the provisions of the decree that the care and custody of Eugene Henning were awarded to the father, Otto Henning. Four years later

while the service man was at the home of Mrs. Schacht, on September 3, 1927, his father Otto F. Henning, married Bessie M. Henning formerly known as Bessie M. Gass.

When Eugene was about fifteen years of age he went to live with his father and his stepmother in Dedham. While he was there his stepmother treated him with all the customary affection and attention that a mother would bestow on a natural child. She took care of his personal effects, did his laundry and furnished his meals which were no doubt paid for largely by the father. While Bessie did not call the service man a "son" or demonstrate her affection by kisses, nonetheless the relationship was reasonably close. No hostility at any time so far as the evidence indicates existed between the boy and his stepmother.

About 1930 the service man moved from the house of his father and stepmother to a boarding house run by a Mrs. Wilson. So far as appears there was no friction at home which caused him to move. He apparently chose to live in a boarding house with a friend, a Mr. James T. Shaw, who was working in the same enterprise with himself, the service man being an employee of Shaw's father and being an assistant to Shaw himself.

After about two years both the service man and Shaw went to the home of Otto and Bessie, the father and stepmother of the service man. The pleasant relationship which had characterized the service man's earlier occupancy of that home continued at the time of his second occupancy.

On January 27, 1940, the service man married Mabel Evelyn Hathaway. They lived together until November 11, 1942, when the service man entered upon active duty in the United States Navy.

After he entered the Navy the service man corresponded with his natural mother, sent her presents and sent her photographs of himself on active duty.

On December 1, 1942, the service man received a policy of national life insurance of $10,000. He originally named as beneficiaries his wife, Mabel Henning, and his father, Otto Henning, as contingent beneficiary. On July 27, 1944, Eugene C. Henning executed a change of beneficiaries, naming only his father, Otto F. Henning, as beneficiary. On October 16, 1944, the marriage of Eugene C. and Mabel H. Henning was dissolved by decree of the Probate Court for Norfolk County. On July 4, 1945, Eugene C. Henning died on active service.

I conclude as a matter of law that at the time of his death Eugene C. Henning left him surviving three persons each of whom was a "parent" within the meaning of Section 801.(f) of Title 38, United States Code. Obviously the father, Otto, at that time was a "parent". He was the natural father and he

had supported the boy, at least in part, up until his twenty-first year. The natural mother, Clara Belle Henning, was also a "parent" within the meaning of the statute. Once one is a natural parent, he or she continue to be such for statutory as well as for other purposes regardless of whether the natural parent does or does not contribute to the support of the child, does or does not discipline the child, is or is not fond of the child, does or does not desert the child. A person once tied by blood as a parent to a child always remains a parent. Such a person is a parent "first", "*last*", and all the time.

The problem with respect to the stepmother, Bessie, is somewhat more complicated. She of course is not a natural parent. She, however, stood in loco parentis during the period of time that Eugene was a minor and as long as it was possible for anybody to stand in loco parentis, that is, until Eugene reached the age of twenty-one. There is no difficulty in a person being in loco parentis, even though a natural parent or two natural parents are alive. This statute gives rights to a person "who last bore" the status of being in loco parentis. At the critical moment, when Eugene became twenty-one, three people stood in loco parentis, one on the basis of both blood and conduct, a second on the basis primarily of blood, and a third, solely on the basis of conduct. All three have the statutory standing necessary to be considered.

In the light of this determination and bearing in mind the fact that Otto F. Henning, the father, was named as beneficiary and continued to survive for some five months after the death of Eugene, I direct that a decree shall be drawn awarding sums due from July 4, 1945, to December 8, 1945, to the representative of the father, Otto F. Henning; sums due from December 9, 1945, to June 30, 1949, equally to the representative of the stepmother, Bessie, and the mother Clara, and payments due since July 1, 1949, to the mother Clara alone.

I have not overlooked in this direction Section 802 (j) of Title 38 which purports to cover the situation where a beneficiary under a policy dies after payment is due but before it is paid. Taking into account the reason of the matter and the decision in *Beaumet* v. *United States*, 2d Circuit, 177 F. 2d, 806, I conclude as a matter of law that the critical point in determining whether a beneficiary or a representative is entitled to take is whether the beneficiary was alive on the date the payment was due. It would be monstrous to give to the Veterans' Administration the power never to pay an insurance policy merely by holding up payments already due until such time as the named beneficiary or the statutory beneficiary dies. This case serves as an admirable illustration, not of any wrongdoing on the part of the Veterans' Administration, but of the injustice which would follow if the contention which

the Government makes were to prevail. Here the stepmother, Bessie, was diligent in presenting her case. Opposition to her, not without reason in view of my opinion, was made by the natural mother. The Veterans' Administration being faced with these conflicting claims refused payment and the matter came before this Court for adjudication. Efforts at a settlement were made. Such efforts failed. In the meantime Bessie died and now the Government suggests that not only Bessie cannot take because she died, but those who are her representatives cannot take and the money remains in the Treasury of the United States. A mere statement of the problem makes it plain that the Government cannot in equity or in law prevail.

A decree is to be drawn in accordance with this opinion, due provision to be made, if possible by agreement, with respect to counsel fees. In the event of failure to agree, application is to be made to the Court.

CHARLES E. WYZANSKI, J.
United States District Judge.

In United States District Court

Judgment

January 12, 1951

The court having filed a memorandum dated October 17, 1950, it is, by the court, this 12th day of January 1951.

Ordered, adjudged and decreed, as follows:

1. That Joseph S. Kennedy, as administrator of the estate of Otto F. Henning (who was the first beneficiary to whom payments should have been made and who was over 30 years of age on July 4, 1945, and who himself never exercised any option to be paid otherwise than by 120 equal monthly installments) do have and recover of and from the defendant, the United States of America $500.00, being the amount of the first six monthly installments of death benefits (calculated at the rate of $83⅓ each) under said policy, which accrued from July 4, 1945, the date of the insured's death, to and including the installment payable December 4, 1945 (the last date on which an installment was due before said Otto F. Henning died December 8, 1945).

2. That the plaintiff, Clara Belle Henning, and Joseph S. Kennedy, as administrator of the estate of Bessie M. Henning, do have and recover of and from the defendant, the United States of America, in equal shares $3,500.00, being the amount of the next forty-two monthly installments of death benefits under said policy which accrued from the installment due January 4, 1946 (the anniversary date following the date on which payments to

the legal representative of Otto F. Henning were discontinued) to and including the installment payable June 4, 1949 (the said Bessie M. Henning having died June 30, 1949).

3. That the plaintiff, Clara Belle Henning, do have and recover of and from the defendant, the United States of America, $1,583.33, being the amount of the next nineteen monthly installments of death benefits payable thereunder commencing July 4, 1949 (the anniversary date following the date on which payments of equal portions of the benefits were discontinued to her and to the administrator of Bessie M. Henning) until January 4, 1951, being the last anniversary date preceding the date this judgment is entered and also the amounts of $83.33 to be paid on the fourth day of each of the 53 months following the date of this judgment, that is the 53 months beginning February 4, 1951, provided that payment on each of those dates shall be contingent on the said Clara Belle Henning being alive that date.

4. That the defendant, the United States of America, deduct $50.00, being 10 per centum (10%) of the total sum paid to the administrator of the estate of Otto F. Henning under the said policy by virtue of and pursuant to this judgment and pay the same to Richard H. Lee, Esquire, 27 State Street, Boston, Massachusetts, for services rendered in this cause.

5. That the defendant, the United States of America, deduct $175.00, being 10 per centum (10%) of the total sum paid to the administrator of the estate of Bessie M. Henning under the said policy by virtue of and pursuant to this judgment and pay the same to Richard H. Lee, Esq., 27 State Street, Boston, Massachusetts, for services rendered in this cause.

6. That the defendant, the United States of America, deduct $175.00 plus $158.33, being 10 per centum (10%) of the total sum of the insurance benefits which have accrued to Clara Belle Henning, plaintiff, to date, and also 10 per centum (10%) of any and all future benefits which may hereafter be paid to her by virtue of and pursuant to paragraph 3 of this judgment and pay the same to Frederick Breen, Esq., 412 Barristers Hall, Boston, Massachusetts, her attorney, for services rendered in this cause.

Dated this 12 day of January 1951.

WYZANSKI,
United States District Judge.

Motion for new trial

Filed January 22, 1951

Now comes the United States of America, defendant in the above-entitled action, and moves this Honorable Court to grant

a new trial of the case on the ground that the judgment entered by the Court is erroneous in that

1. It awards benefits to the estate of a deceased beneficiary contrary to the controlling statutes and regulations of the Veterans Administration, particularly Section 602 (j) of Title 38 U. S. Code, and Section 602 (i) of Title 38 U. S. Code, and Section 602 (g) of Title 38 U. S. Code.

2. It holds that two persons, namely Bessie M. Henning, the insured's stepmother, and Clara B. Henning, the insured's natural mother, both "last bore" the relationship of a mother to the insured.

3. It holds that the insured's natural mother, Clara B. Henning, satisfies the requirements of Section 602 (h) (3) (c) of the National Service Life Insurance Act, despite the facts indicating that Mrs. Bessie M. Henning, the insured's stepmother, assumed the relationship of a mother to the insured when he was about fifteen years of age and continued to occupy such relationship until the insured married on January 27, 1940, at the age of twenty-eight, or at least until he was twenty-one years of age.

GEORGE F. GARRITY,
United States Attorney.
By PHILIP T. JONES,
Assistant U. S. Attorney.

Denied, WYZANSKI, J., Jan. 22, '51.

MEMORANDUM: The foregoing motion for new trial filed by defendant, was denied by the court, Wyzanski, J., as appears endorsed thereon.

JOHN A. CANAVAN, *Clerk.*

In United States District Court

Notice of appeal

Filed January 31, 1951.

Notice is hereby given that the defendant, United States of America, appeals to the United States Court of Appeals for the First Circuit from the judgment entered in this action on January 12, 1951.

GEORGE F. GARRITY,
United States Attorney.
By PHILIP T. JONES,
Assistant U. S. Attorney.

In United States District Court

Statement of points

Filed March 1, 1951

1. The District Court erred in entering judgment dated January 12, 1951, in this action.

2. The District Court erred in holding that once one is a natural parent he or she continues to be such for statutory as well as for other purposes regardless of whether the natural parent does or does not contribute to the support of the child, does or does not discipline the child, is or is not fond of the child, does or does not desert the child.

3. The District Court erred in holding that two persons, namely, Bessie M. Henning, the insured's stepmother, and Clara B. Henning, the insured's natural mother, both "last bore" the relationship of a mother to the insured.

4. The District Court erred in holding that the estate of a deceased beneficiary, Bessie M. Henning, is entitled to receive a part of the proceeds of a policy of National Service Life Insurance which matured prior to August 31, 1945.

5. The District Court erred in holding that the estate of a deceased beneficiary, Otto F. Henning, is entitled to receive a part of the proceeds of a policy of National Service Life Insurance which matured prior to August 31, 1945.

6. The District Court erred in awarding damages to the estate of Otto F. Henning, which estate was not a party to this proceeding.

7. The District Court erred in holding that the critical point in determining whether a beneficiary or a representative of a deceased beneficiary's estate is entitled to take proceeds of a National Service Life Insurance policy is whether the beneficiary was alive on the date the payment was due.

8. The District Court erred in denying the motion of the defendant, United States of America, for new trial.

GEORGE F. GARRITY,
United States Attorney.
By PHILIP T. JONES,
Assistant U. S. Attorney.

Designation of contents of record on appeal [omitted in printing]

MEMORANDUM: Order for enlargement of time in the District Court for filing record and docketing case to and including April 11, 1951, is here omitted.

JOHN A. CANAVAN, *Clerk.*

Clerk's certificate to foregoing transcript omitted in printing.

United States Court of Appeals for the First Circuit.

OCTOBER TERM, 1950

No. 4571

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

CLARA BELLE HENNING ET AL., APPELLEES

Order re statement of points

April 13, 1951

Upon motion, assented to, Leave is hereby granted appellant to amend its statement of points by adding thereto the following:

9. The District Court erred in awarding benefits "in 120 equal monthly installments" contrary to statute.

By the Court:

(S) ROGER A. STINCHFIELD,

Clerk.

PROCEEDINGS IN COURT OF APPEALS

On April 16, 1951, the following "Suggestion of Death" was filed:

Suggestion of Death

Now comes Joseph S. Kennedy of Dedham, Massachusetts, and states that Bessie M. Henning, who was the Administratrix of the estate of Otto F. Henning, late of Dedham, and who filed an original answer in the District Court of the United States, No. 7917, in which she alleged her representative capacity as Administratrix, died on the 30th day of June, 1949, prior to the entry of judgment in the said case, without having completed her administration of the estate of Otto F. Henning, and that on the 3rd day of January, 1951, Joseph S. Kennedy was duly appointed the Administrator of the estate not already administered of said Otto F. Henning, and succeeded to the powers and duties previously exercised by Bessie M. Henning, as legal representative of the estate of said Otto F. Henning, and that the said appointment of Joseph S. Kennedy was made known to counsel in the above case and to the Court, and that the parties believed that substitution of the successor in trust had been properly effected, and that judgment was rendered on the basis of said substitution without claim of error by any parties.

Wherefore the said Joseph S. Kennedy moves that he as Administrator of the estate not already administered of Otto F. Henning be substituted for Bessie M. Henning as Administratrix, and that the pleadings filed by the said Bessie M. Henning as such Administratrix be adopted as pleadings of the defendant Joseph S. Kennedy, the Administrator of the estate not already administered of Otto F. Henning.

By his Attorney:

(S.) Richard H. Lee,
10 State St., Boston.

Assented To:

(S.) Frederick Breen, *Attorney.*
for Clara Belle Henning.

(S.) Philip T. Jones, *Assistant U. S. Attorney.*

On the same day, April 16, 1951, the following order of Court was entered:

Order of Court—April 16, 1951

Upon suggestion of death of Bessie M. Henning, Administratrix of the estate of Otto F. Henning, and upon motion, assented to, Joseph S. Kennedy, as Administrator of the estate not already administered of said Otto F. Henning, is hereby substituted for said

Bessie M. Henning, Administratrix, and is admitted as party defendant-appellee herein.

By the Court;

(S.) ROGER A. STINCHFIELD,
Clerk.

PROCEEDINGS IN COURT OF APPEALS

Thereafter, to wit, on June 5, 1951, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and Honorable John P. Hartigan, Circuit Judges, sitting.

Thereafter on September 4, 1951, the following opinion of the Court was filed:

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT—OCTOBER TERM, 1950

No. 4571

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

CLARA BELLE HENNING ET AL., APPELLEES

Appeal from the United States District Court for the District of Massachusetts

[93 F. Supp. 380]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Russell Chapin, Attorney, Department of Justice, with whom *George F. Garrity*, United States Attorney, *Philip T. Jones*, Assistant U. S. Attorney, *Holmes Baldridge*, Assistant Attorney General, and *D. Vance Swann*, Attorney, Department of Justice, were on brief for United States of America.

Frederick Breen for Clara Belle Henning.

Richard H. Lee, with whom *Lloyd, Lee & Sherman* were on brief for Joseph S. Kennedy as Administrator of the Estate of Bessie M. Henning and also as Administrator of the estate not already administered of Otto F. Henning.

OPINION OF THE COURT—September 4, 1951

WOODBURY, *Circuit Judge:*

This appeal presents questions with respect to the disposition of the proceeds of a policy of National Service Life Insurance. There is no dispute as to the facts.

The insured serviceman, Eugene C. Henning, was born to Otto F. and Clara Belle Henning on September 20, 1912, in Boston, Massachusetts. Otto and Clara separated almost immediately after Eugene's birth, and Eugene went with his mother to live in his maternal grandmother's home where he was supported entirely by the maternal side of his family. This arrangement continued until about 1920 when the insured went to live in the home of his paternal grandmother. While there the mother made some, but not great, financial contribution toward his support. Then about 1922 the insured moved to the home of a cousin on his father's side of the family. In 1923, Otto and Clara were divorced on Otto's petition, custody of Eugene being awarded to Otto, and in September 1927 Otto married one Bessie M. Gass. Thereupon the insured, who was then about fifteen years of age, went to live with his father and stepmother.

While he was living in his father's newly established home his stepmother treated him with all the affection, and gave him all the attention, that a natural mother would ordinarly bestow upon a son. She cared for his personal effects, did his laundry, and furnished him meals which the court below found "were no doubt paid for largely by the father." While Bessie did not call the insured her "son", or demonstrate her affection for him effusively, their relationship was reasonably close and no hostility ever existed between them.

About 1930 the insured moved to a boarding house, not because of any family friction, but because he wished to live with the son of his employer, who was a close friend and fellow worker. After about two years in the boarding house, however, both he and his friend went to live with Otto and Bessie. The pleasant relationship which had characterized the insured's earlier occupancy of his father's new home continued throughout this second occupancy.

In January 1940 the insured married, and thereafter he lived with his wife until November 11, 1942, when he entered upon active duty in the United States Navy. After he entered the navy he corresponded with his natural mother and sent her presents and photographs of himself.

On December 1, 1942, the $10,000 policy of National Service Life Insurance involved herein issued on the life of the insured. In this policy the insured's wife was named as the beneficiary and his father as the contingent beneficiary. In July, 1944, however, the insured, by executing the appropriate form, named his father

as sole beneficiary of the full amount of insurance, and in October of that year his marriage was annulled. The insured's former wife makes no claim to the proceeds of this insurance policy and is not a party to this action.

The insured died on active service on July 4, 1945, and his father, apparently without filing any claim to the proceeds of the policy, died on December 8 of the same year. Clara Belle filed her claim with the Veterans' Administration February 4, 1946, alleging that she was the mother of the insured, and ten days later, Bessie, the stepmother, also filed a claim based on the contention that she had last stood in loco parentis to the insured. The Veterans' Administration determined that Clara Belle, as the natural mother, had last stood in loco parentis to the insured and allowed her claim, disallowing that of Bessie. The Board of Veterans' Appeals, however, reversed. It found that the stepmother, Bessie, had last stood in loco parentis to the insured and allowed her claim, and this, it is agreed, constituted a final administrative disallowance of Clara Belle's claim.

Clara Belle thereupon brought the instant action wherein Bessie was impleaded as a defendant. Bessie, however, died on June 30, 1949, before the case came on for trial in the court below, thus leaving the natural mother the sole survivor of those who had ever stood in any parental relationship to the insured.

On these facts the court below, dividing the face amount of the policy into one hundred twenty equal installments of $83.33\frac{1}{3}$ each, determined that the installments which fell due from the time the policy matured to the date the named beneficiary, the father, died, were payable to his estate; that the installments which fell due from the date of the father's death to the date the stepmother died were payable one half to the natural mother and one half to the stepmother's estate, since during that time both women bore the parental relationship requisite under the statute to qualify as beneficiaries, and that subsequent installments were payable to Clara Belle, the natural mother, should she survive to receive them. The present appeal by the United States is from the judgment entered in conformity with these conclusions.

The Government makes three principal contentions. It says that the statute applicable on the date the insurance matured clearly forbad the payment of any installment of National Service Life Insurance to the legal representative of a deceased beneficiary; that two women, one the natural mother and the other the stepmother, cannot, under the applicable statutory provisions, both simultaneously bear the parental relationship in the insured requisite for qualification as a beneficiary; and that the court below erred, first in directing payment in one hundred twenty equal installments without regard to the attained age of the beneficiary and without election by the beneficiary as to the method of pay-

ment, and second in directing the payment of monthly benefits in the amount of $83.33⅓ each.

The major issue in this case is whether the District Court erred in ordering that, under the National Service Life Insurance Act of 1940 (54 Stat. 1008) as amended in 1942 (56 Stat. 657), payments be made to the administrators of the estates of deceased beneficiaries. The Government argues that it did, and in support of its position points to § 602 (i) and (j) of the 1940 Act (which were not amended in 1942) wherein it is provided in material part as follows:

> "(i) . . . The right of any beneficiary to payment of any installment shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority . . .
>
> "(j) No installments of such insurance shall be paid to the heirs or legal representatives as such of . . . any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made."

The Government's position is that the above language clearly and unequivocally provides that a beneficiary must be alive to receive the payment of any installment, and that if he or she should die before receiving any installment, even though it was due and owing but for any reason, even the Government's neglect, not paid, then payment must be made to the beneficiary or beneficiaries in the class next entitled, or, in default of such, no payment at all may be made. The District Court characterized the result of this construction of the Act as "monstrous", and, relying upon *Baumet* v. *United States*, 177 F. 2d 806 (2nd Cir. 1949), *cert. den.* 339 U.S. 923, *motion for leave to file petition for rehearing denied*, 339 U.S. 973, held that installments which fell due but were not paid during a beneficiary's lifetime were payable to the legal representative of the beneficiary, and that the statutory language only required that installments which accrued after a beneficiary's death were payable to the next entitled beneficiary. Although there are several District Court cases wherein the opposite view prevailed,[1] we agree with the court below.

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[1] *Baumet* v. *United States*, 81 F. Supp. 1012 (S.D.N.Y. 1948); *Carpenter* v. *United States*, 72 F. Supp. 510 (W.D.Pa. 1947); *rev'd on other grounds*, 168 F.2d 369 (3rd Cir. 1948); *Washburn* v. *United States*, 63 F. Supp. 244, 228 (W.D.Mo. 1945).

It is certainly true that the literal wording of the statute goes a long way toward sustaining the Government's contention. On the other hand, it requires little imagination to visualize some rather amazing consequences of the interpretation of the statute urged by the Government. For example, should the officer of the Veterans' Administration charged with the payment of benefits on some pretext or other withhold payments until a beneficiary died, he could then pay the full proceeds of the insurance to the beneficiary next in priority and thus give the latter benefits to which the deceased beneficiary was justly entitled. Or the paying officer could defeat the payment of any benefits whatever simply by withholding payment of any installment until all beneficiaries died. Moreover, as a further and more probable example, as the Court of Appeals pointed out in the *Baumet* case, a second priority beneficiary, however specious his claim, could sue upon it, and, if fortunate enough to be able to make his suit outlive the first priority beneficiary, who might be aged or ill, take all to the exclusion of the person or persons in the class for whom Congress had expressed the greater concern. To say the least it seems unlikely that Congress intended to pass legislation, particularly remedial legislation such as the Act under consideration, capable of producing such unjust, startling and capricious results.

Nevertheless it is true, as the Government suggests, that in the War Risk Insurance Act of 1924 (43 Stat. 614) Congress specifically provided for the payment of accrued installments to the estates of deceased beneficiaries, and that by amendment of the 1940 Act in 1946 (60 Stat. 786) it made a like specific provision with respect to National Service Life Insurance maturing on or after August 1, 1946, over a year after the insured's death. From this it can be argued that by the omission of a similar specific provision of the Act of 1940 as it stood amended in 1942, Congress must have intended to deny any payment of installments, even those which had accrued during a beneficiary's lifetime, to the estate of a beneficiary who had died.

However, in view of the hasty consideration given by Congress to the 1940 Act and its 1942 amendment (see *Carpenter* v. *United States*, 168 F. 2d 369 (3rd Cir. 1948)), the unfortunate consequences resulting from the literal interpretation of the statutory language, and the lack of any legislative history to indicate the contrary, we think the deviation in 1940 act from the text of the earlier Act of 1924 was not purposeful and therefore is not significant. Like considerations also lead us to the conclusion that the 1946 amendment referred to above was intended only to clarify, not to alter, the original Act. And we do not think too much significance should be attached to the fact that Congress made its 1946 amendment applicable only to insurance maturing on or after August 1, 1946, for Congress at that time was not merely amending the Act in the particular respect under consideration but

was providing a wholly new system for the payment of benefits, and hence it can hardly be assumed that its attention was focused on the precise narrow question of relatively minor importance with which we are here concerned.

The foregoing considerations, plus consideration of the remedial nature of the statute, lead us to construe the Act liberally in the direction of the payment of benefits rather than the making of profits for the Government by escheat, and hence we agree with the interpretation of the statute by the court below and by the Court of Appeals for the Second Circuit in the *Baumet* case, *supra*.

This brings us to the question whether the natural mother and the stepmother qualify under the statute as simultaneous beneficiaries with the result that the installments which accrued while both lived are payable to the natural mother and the stepmother's estate, share and share alike.

Section 601 of the 1940 Act as it stood after amendment in 1942 (56 Stat. 659) defined the terms "parent", "father", and "mother" to "include a father, mother, father through adoption, mother through adoption, and persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year." Moreover, at the same time § 602 (g) of the original Act was amended by deletion of the specific provision that for the purpose of designation of beneficiaries the term parent included those persons who had stood in loco parentis to the insured, and the same amendment also altered § 602 (h) (3) (C) to read:

> "(h) Such insurance shall be payable in the following manner:
>
> * * *
>
> (3) Any installments certain of insurance remaining at the death of any beneficiary shall be paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—
>
> * * *
>
> (C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares;"
>
> * * *

The question is purely one of statutory interpretation. And the statutory language quoted above which we are called upon to interpret is not by any means as clear as it might be.

The District Court took the view that Clara Belle Henning as the natural mother was the insured's mother "'first', *'last'* and all the time" for statutory as well as for other purposes. But it found that the stepmother, Bessie, had stood in loco parentis to Eugene for the period of time required by the statute to qualify as a beneficiary. Thus it concluded that three persons had borne a parental relationship to Eugene; the father, Otto, on the basis of both blood and conduct, the natural mother, Clara, on the basis primarily of blood but to some extent on conduct, and the stepmother, Bessie, solely on the basis of conduct. Then, finding no difficulty in the concept of "a person being in loco parentis, even though a natural parent or two natural parents were alive", it concluded that after the death of Otto, the named beneficiary and father, both Clara and Bessie bore the parental status required to qualify as beneficiaries under the statute. Hence it ruled that both were entitled to share equally in the installments which fell due from the time Otto died to the time of Bessie's death.

The Court of Appeals for the Second Circuit, however, in a second appeal in the *Baumet* case, (*Baumet* v. *United States*, decided July 23, 1951) explicitly disagreed with the court below. It said that an insured could have "but one maternal parent and one paternal parent", and since the statute recognized persons in loco parentis as parents, and the insured's foster parents last bore that relationship to the insured, the foster father was the paternal parent for the purpose of the statute and the appellant as the natural father "cannot satisfy the statutory requirement."

The facts in the *Baumet* case, however, differ from those in ours in that in *Baumet* the insured and his natural father were estranged, and perhaps the latter had wholly abandoned all parental responsibility and control; whereas in ours there is no finding or evidence of any estrangement, to say nothing of abandonment, or even any lack of parental feeling, between Eugene and his mother, Clara Belle. Furthermore the holding of the *Baumet* case leaves unanswered, and it would seem unanswerable, cases in which a maternal parent and another person of the same sex had combined resources to establish, maintain and support a home for a child who later became an insured. For example, suppose the widowed mother of an infant and the mother's sister, (the child's aunt,) live together, each contributing substantially equally to the support of the home and the feeding and clothing of the child and each sharing in the child's upbringing. Both would then be in loco parentis to the child and it would seem hardly within the contemplation of Congress that one should take all the insurance proceeds to the exclusion of the other.

Certainly Congress intended by the statutory language to include in the class of parents those who, regardless of blood, had last stood in loco parentis to an insured for at least a year. But

we do not think that Congress intended by so doing completely to exclude a natural parent from the class of beneficiaries in every case wherein some other person of the same sex had stood in loco parentis to an insured for the requisite period. For instance, it seems to us hardly likely that Congress would wish to eliminate as a beneficiary a natural parent, who, perhaps with all parental good will, happened for ill health, financial disaster, or some other comparable reason to be incapable of caring for his or her child, and instead to favor some stranger to the blood who might by force of temporary circumstances have last stood for a year in loco parentis to an insured.

On the whole, therefore, and with all deference to the Court of Appeals for the Second Circuit, we incline to the view of the District Court. In doing so, however, we are not to be understood as holding that a natural parent by that fact alone necessarily remains for life a statutory beneficiary under all circumstances. It may be that a natural parent who has voluntarily for some selfish reason abandoned all parental responsibility cannot be heard to assert his or her parenthood only for the purpose of collecting insurance benefits. See *United States* v. *Kwasniewski*, 91 F. Supp. 847, 853 (E.D. Mich. 1950). This question, however, is not now before us and we therefore pass it until it is presented.

We come now to the question whether the court below fell into error in ordering payments in one hundred twenty equal installments in the absence of an election by the first beneficiary, Otto, to be paid in that manner.

The statute as it stood on the date of the insured's death did not give the first beneficiary any election as to mode of payment. It provided in (1) and (2) of § 602 (h) of the 1940 Act, which were not amended in 1942, that if the first beneficiary were under thirty years of age on the date of maturity the insurance was payable in two hundred and forty equal monthly installments, and that if the beneficiary were thirty or more years of age on the pivotal date, the payment was to be made "in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary." It being clear from the available data that the first beneficiary, the father Otto, was over thirty when his son died, it is evident that under the foregoing statutory provision the policy was payable without any election on Otto's part in equal monthly installments for as long as he lived with payment of one hundred and twenty such installments certain whether he died in the meantime or not.

But the above statutory provisions were amended in 1946 (60 Stat. 783) by providing for the permissive inclusion by the administrator in policies maturing prior to the effective date of the amendment of provisions giving the first beneficiary the power to elect

between installment payments as above and a refund life income, also payable in monthly installments.

Whether or not the Administrator ever did include an election provision in Eugene's policy does not appear from the record. But however this may be, the election, if it was given, was given to the first beneficiary, who we have held to have been Otto, and it is clear that he could not have exercised it for he died without making any claim under the policy. Therefore as we see it, the policy in suit was payable in equal monthly installments during Otto's life-time with one hundred and twenty such installments certain.

The question of the amount of monthly installments remains.

The court below arrived at their amount simply by dividing the face amount of the policy into one hundred and twenty equal parts. This was error. The amount of the monthly installments must be arrived at as a result of actuarial computations based on the life expectancy of the first beneficiary, as fully explained in *United States* v. *Zazove*, 334 U.S. 602 (1948). The case must, therefore, be remanded for the purpose of making this computation.

The judgment of the District Court is reversed and the case is remanded to that Court for further proceedings consistent with this opinion.

On the same day, September 4, 1951, the following judgment was entered:

JUDGMENT—September 4, 1951

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that Court for further proceedings consistent with the opinion passed down this day.

By the Court:

(S:) ROGER A. STINCHFIELD,
Clerk.

Thereafter, to wit, on September 20, 1951 mandate issued.

CLERK'S CERTIFICATE

I, Roger A. Stinchfield, Clerk of the United States Court of Appeals for the First Circuit, certify that the foregoing pages, numbered 1 to 55 inclusive, contain and are a true copy of the record on appeal and all proceedings to and including October 19, 1951, in the cause in said Court numbered and entitled, No. 4571, United

States of America, defendant, appellant, versus Clara Belle Henning et al., appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this nineteenth day of October, A. D. 1951.

(S.) ROGER A. STINCHFIELD,
Clerk.

[SEAL.]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 972697 934

Supreme Court of the United States

No. 456, October Term, 1951

Title omitted.

Order allowing certiorari. Filed January 28, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered, that the duly certified copy of the transcript of the proceeding below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1952

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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

CLARA BELLE HENNING, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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CITATIONS

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OCTOBER TERM, 1951

No. 456

UNITED STATES OF AMERICA, PETITIONER

v.

CLARA BELLE HENNING, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on September 4, 1951.

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 26) is reported at 93 F. Supp. 380. The opinion of the United States Court of Appeals for the First Circuit (R. 42) is reported at 191 F. 2d 588.

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1951 (R. 50). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether Section 602 of the National Service Life Insurance Act, which, at the time the policy here involved matured, conditioned the right to receive payments upon a beneficiary "being alive to receive such payments" and provided that "No installments of such insurance shall be paid to the heirs or legal representatives as such * * * of any beneficiary", precluded the payment of any installments of such insurance to the representative of a deceased beneficiary who survived the insured but had not received any payments at the time of his own death.

2. Whether, under Section 602(h)(3)(C) of the National Service Life Insurance Act, which provides that only a parent "who last bore that relationship" is eligible as a statutory beneficiary, both the natural mother and stepmother of an insured may qualify as statutory beneficiaries, notwithstanding the fact that the stepmother who had stood *in loco parentis* to the insured was the maternal parent who "last bore" that relationship to him.

3. Whether the National Service Life Insurance Act permitted a beneficiary to elect a refund life income mode of payment at the time the policy in question matured, and, if so, whether such right of election was limited to the designated beneficiary or devolved to the beneficiary "first receiving payment."

STATUTES INVOLVED

The pertinent provisions of the National Service Life Insurance Act of 1940, 54 Stat. 1008, as amended by the Act of July 11, 1942, 56 Stat. 657, the Act of September 30, 1944, 58 Stat. 762, and the Act of August 1, 1946, 60 Stat. 781, 38 U.S.C. 801, *et seq.*; and Section 3 of the Servicemen's Indemnity Act of 1951, Public Law 23, 82nd Cong., 1st Sess., Chapter 39, effective April 25, 1951, are set forth in the Appendix, *infra,* pp. 19-23.

STATEMENT

Eugene C. Henning, while in the naval service of the United States, was granted a $10,000 policy of National Service Life Insurance, effective December 1, 1942. On July 4, 1945, the date of the insured's death, Otto F. Henning, father of the insured, was the designated beneficiary (R. 24). Five months later, the father died, without having filed any claim for insurance benefits (R. 24). Thereafter, Clara Belle Henning, the natural mother of the insured, and Bessie M. Henning, the stepmother of the insured, each filed claims with the Veterans Administration for the insurance proceeds (R. 24-25). The natural mother contended that she was entitled to the proceeds as the statutory beneficiary within the meaning of Section 602(h)(3)(C) of the Act (Appendix, p. 20) which provides that any installments of insurance remaining unpaid at the death of a beneficiary shall be payable, "if no widow, widower, or child, to the parent or parents of the insured who last bore that

relationship, if living." The stepmother alleged that since Section 601(f) (Appendix, pp. 21-22) [38 U.S.C. 801(f)] of the Act provided that the term "parent" included "persons who have stood *in loco parentis* to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year," she was the proper statutory beneficiary as she had stood *in loco parentis* to the insured for a period of not less than one year prior to his entry into active service and was thus the parent "who last bore that relationship" within the meaning of Section 602(h)(3)(C). The Veterans Administration determined that Bessie M. Henning, the stepmother, had stood *in loco parentis* to the insured prior to his entry into active military service, that she was thus the last person to bear the relationship of mother to the insured and, as such, was entitled to the insurance benefits (R. 25).

Following final administrative disallowance of her claim (R. 25), the natural mother, Clara Belle Henning, instituted this action in the United States District Court for the District of Massachusetts, as authorized by Section 17 of the Act (38 U.S.C. 817), to recover the insurance proceeds (R. 5). The stepmother was joined as an additional party defendant (R. 10-11). On June 30, 1949, before the trial of the action, the stepmother died (R. 15-16) and her administrator was continued as a defendant (R. 23).

The District Court held that the insured left

surviving him three persons, each of whom was a parent within the meaning of Section 601(f) (38 U.S.C. 801(f)), *i.e.*, the natural father, Otto Henning, the natural mother, Clara Belle Henning, and the stepmother, Bessie M. Henning (R. 29-30). In making this finding, the court ruled that one who is a natural parent continues to be a parent for statutory purposes as well as others and, "such a person is a parent 'first', 'last' and all the time" (R. 29-30). The court further held that the critical point in determining whether or not a beneficiary or the representative of a deceased beneficiary is entitled to receive insurance benefits depends upon whether the beneficiary was alive on the date payment was due, as distinguished from the date payment was made. In awarding the insurance proceeds, the court held that because Otto Henning, the designated beneficiary, survived the insured, the representative of his estate[1] was entitled to those payments falling due from July 4, 1945 (the date of the insured's death) to December 8, 1945 (the date of the father's death); that those payments falling due from December 9, 1945, to June 30, 1949, the date of death of Bessie M. Henning (the stepmother), should be paid equally to the representative of the estate of Bessie M. Henning

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[1] On the date the District Court's memorandum opinion was rendered, October 17, 1950, no administrator of the estate of Otto Henning had been appointed. On April 16, 1951, the court of appeals permitted the administrator of the estate to be added as a party defendant-appellee (R. 41-42).

and to Clara Belle Henning (the natural mother); and that those payments falling due subsequent to July 1, 1949, should be paid to Clara Belle Henning (R. 30). The judgment, entered on January 12, 1951 (R. 31-33), pursuant to the court's opinion, additionally specified that payments, as above stated, should be made in 120 installments of $83 1/3 each (the face value of the policy divided by 120), without any election as to mode of payment on the part of the beneficiaries.

On appeal, the Court of Appeals for the First Circuit reversed as to the method of computation of the monthly payments but affirmed the remainder of the findings and conclusions of the trial court, including the finding that the beneficiary was not entitled to elect as to the mode of payment (R. 41-50).

REASONS FOR GRANTING THE WRIT

1. The National Service Life Insurance Act of 1940, as amended, clearly and unequivocally provides that a beneficiary is entitled to only such installments as are paid to him during his life, irrespective of when payment became due under the terms of the policy. Section 602(i) [38 U.S.C. 802(i)] specifically declares that:

> * * * The right of any beneficiary to payment of any installments shall be conditioned upon his or her *being alive to receive such payments.* No person shall have a vested right *to any installment or installments of any such*

> *insurance and any installments not paid to a beneficiary during such beneficiary's lifetime* shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority * * *. [Italics supplied.]

Section 602(j) [38 U.S.C. 802(j)] directly prohibits the payment of any such installments to the estate of the beneficiary, as such. It provides that:

> No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made.

Under the provisions of these sections of the Act, no rights are conferred on a beneficiary with respect to installments which fall due, but are not paid to the beneficiary, during his lifetime, and such installments do not inure to the beneficiary's estate upon the latter's death.

Despite the plain language of these two sections, the court of appeals and the trial court relied on the reasoning and decision of *Baumet* v. *United States*, 177 F.2d 806 (C.A. 2) (reversing 81 F. Supp. 1012 (S.D.N.Y.)), certiorari denied, 339 U.S. 923, and held that the critical point in determining whether the beneficiary or his representative is entitled to take is whether the beneficiary was alive on the date payment was due. In the *Baumet* case, the court of appeals quoted but one

sentence from Section 602(i), *viz.*, "The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments" and construed that sentence by placing undue emphasis on the words "alive to receive" so as to infer they mean "ready to receive". The court, however, ignored the very following sentence, which clearly indicates that such a construction is erroneous: "No person shall have a vested right to any installment or installments of any such insurance and any installments *not paid to a beneficiary during such beneficiary's lifetime* shall be paid to a beneficiary or beneficiaries within the permitted class next entitled to priority * * *" (italics supplied). The court in the *Baumet* case overlooked this language and held that "the right to those installments [falling due subsequent to the insured's death and prior to the beneficiary's death] became vested in him [the beneficiary]" and directed payment to the beneficiary's estate, even though the next Section, 602(j), declares: "No installments of such insurance shall be paid to the heirs or legal representatives as such * * * of any beneficiary * * *."

The plain language of these two sections, read as a whole, is sufficient to foreclose the construction suggested in the *Baumet* case and adopted by the court in the instant case. Even if the language of the statute were not clear, reference to its legislative history and to prior and subsequent acts of

Congress clearly confirms the interpretation urged by the Government.

In enacting the National Service Life Insurance Act of 1940, the draftsmen had the benefit of the experience and model of the World War Veterans' Act of 1924, 43 Stat. 607. That Act provided that accrued installments of insurance unpaid at the time of the death of the beneficiary would be paid to the beneficiary's personal representatives (Section 26, 38 U.S.C. 451), while the present value of all installments not yet due should accrue to the estate of the insured (Section 303, 38 U.S.C. 514). The effect of the 1924 Act, therefore, was to provide a clear and precise statutory scheme whereby installments accrued, but unpaid, during the lifetime of the beneficiary, became part of the latter's estate. *McCullough* v. *Smith*, 293 U.S. 228, *Singleton* v. *Cheek*, 284 U.S. 493; cf. *Baumet* v. *United States*, 81 F.Supp. 1012 (S.D.N.Y.), reversed, 177 F.2d 806 (C.A. 2). By omission of any similar provision in the National Service Life Insurance Act of 1940, and by the clear language of 38 U.S.C. 802 (i) and (j), Congress manifested its intention that benefits, so far as insurance maturing prior to August 1, 1946 is concerned, should be paid only to living beneficiaries.

The Act of August 1, 1946 (60 Stat. 781), amended the National Service Life Insurance Act by adding to Section 602 subsections (t) and (u), which made insurance benefits payable to the estates of deceased beneficiaries in certain instances

and to the estates of deceased insureds in other instances. Congress thus expressly recognized that prior thereto insurance benefits were payable only to living beneficiaries, as it emphasized by the fact that it did not make the terms and provisions of the Act of August 1, 1946 retroactive, but instead amended the language of Section 602(i) and (j) by adding: "The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of the Insurance Act of 1946." Section 5(b), Act of August 1, 1946, 60 Stat. 781, 783. In urging the passage of subsections (t) and (u), which permitted payment of insurance proceeds to estates of deceased insureds and beneficiaries, Congressman Rankin stated:

> Under existing law, if there is no person within the permitted class of beneficiaries above specified *living to receive* payments of insurance, *no payments are made.* [Italics added.] [92 Cong. Rec. 6170.]

The 1946 amendments to the Act have been held to represent a change of policy on the part of Congress to enlarge the class of beneficiaries of policies maturing after August 1, 1946, but as retaining the restricted class of beneficiaries for policies which had previously matured. *Niewiadomski* v. *United States,* 159 F.2d 683 (C.A. 6), certiorari denied, 331 U.S. 850. As the court in the latter case pointed out, "The liberalizing effect of the amendment could have been made applicable to all policies previously issued" (159 F.2d, at 687).

The question of whether payments of proceeds of National Service Life Insurance policies can be made to the estate of deceased beneficiaries is no longer limited to policies maturing prior to August 1, 1946 (as was the case when we filed the Memorandum for the United States in *Baumet* v. *United States,* No. 331, Misc., October Term, 1949). For, on April 25, 1951, Congress enacted the Servicemen's Indemnity Act of 1951 (Public Law 23, 82nd Cong., 1st Sess.) which, in providing free life insurance in the amount of $10,000 for servicemen during the period of military service, commands (Section 3) that:

> Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary, if any; otherwise, to the beneficiary or beneficiaries within the permitted class next entitled to priority: *Provided,* That no payment shall be made to the estate of any deceased person.

Thus, there is presented under this new statute, as well as with respect to National Service Life Insurance policies matured prior to August 1, 1946, the question of whether effect is to be given to the explicit Congressional policy of channeling benefits to living beneficiaries—rather than to the estates of dead beneficiaries. The quoted provision of the 1951 Act simply reiterates the policy set forth in Section 602(i) and (j) of the 1940 Act that a beneficiary is entitled to only such installments as are

actually paid to him during his lifetime. The ruling of the court below and of the *Baumet* case is, therefore, now of sufficient importance to call for review by this court.

At least four district court decisions, in well reasoned opinions, have specifically denied payment of proceeds of insurance to the estates of deceased beneficiaries. *Washburn* v. *United States*, 63 F. Supp. 224 (W.D. Mo.); *Carpenter* v. *United States*, 72 F. Supp. 510 (W.D. Pa.), reversed on other grounds, 168 F.2d 369 (C.A. 3); *Baumet* v. *United States*, 81 F. Supp. 1012 (S.D.N.Y.), reversed, 177 F.2d 806 (C.A. 2); *Brackeen* v. *United States*, N.D. Texas (July 26, 1951).[2] Moreover, the consistent administrative construction, presumably known to Congress, has been to deny such payments, a practice which has controlled the settlement of many claims. This administrative practice is itself entitled to great weight and should not be overturned except for the most compelling reasons. *United States* v. *Citizens Loan & Trust Co.*, 316 U.S. 209; *United States* v. *Madigan*, 300 U.S. 500; *United States* v. *Jackson*, 280 U.S. 183.

2. Where the designated beneficiary under a National Service Life Insurance policy is not

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[2] In the latter case, the District Court held:

That Bonnie Mae Gayler having died subsequent to the death of the insured, but without having filed any claim for the subject insurance, neither she nor her estate is entitled to the proceeds thereof in virtue of the express limitations contained in 38 U.S.C.A., Sec. 802(i).

eligible to receive the proceeds of the policy, such proceeds are payable as provided by Section 602 (h), 38 U.S.C. 802(h). Subsection (3)(C) of that Section provides that payment shall be made:

> if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares * * *.

The court below took the position that the natural mother of the insured is the insured's mother "'first,' 'last' and all the time for statutory as well as for other purposes" (R. 48), so that she was entitled to share in the proceeds of the policy equally with the stepmother of the insured, notwithstanding that the stepmother was the mother *in loco parentis* "who last bore that relationship" to the insured[3] within the meaning of Section 602(h)(3)(C).

This holding presents a direct conflict with the decision of the Court of Appeals for the Second Circuit in *Baumet* v. *United States*, 191 F.2d 194. In the latter case, the Court of Appeals stated that the right of a stepfather who was found to stand *in loco parentis* to the insured is superior to that of the natural father and excludes the natural father from all rights to proceeds. The court said at pp. 196-197:

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[3] Section 601(f) (38 U.S.C. 801(f)), at the date of the insured's death, defined the terms "parent," "father," and "mother" as including "* * * persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year."

> The insured can have but one maternal parent and one paternal parent. Since Section 801 (f) recognizes a person *in loco parentis* as a parent, the parents of William Baumet, Jr., at the time of his enlistment were Julie Peters, his foster mother, and John Peters, his foster father. Hence John Peters was the paternal parent who last bore that relationship to the insured, and the appellant cannot satisfy the statutory requirement. If Henning v. United States, D.C. D. Mass., 93 F. Supp. 380, holds the contrary we respectfully disagree with it.

The decision by the court below is also in conflict with the conclusion reached by the Tenth Circuit Court of Appeals in *Leyerly* v. *United States*, 162 F.2d 79, that a parent *in loco parentis* is entitled to receive the proceeds of a policy in place of a natural parent if the former was the parent "who last bore that relationship."

The legislative history of the amendment which added the words *"who last bore that relationship"* to Section 602(h)(3)(C) supports the contention of the Government that Congress intended benefits of insurance passed by devolution to be payable only to the one mother or father "who last bore that relationship." The italicized words were added by Section 9 of the Act of July 11, 1942 (56 Stat. 657) as the result of a committee amendment in the Senate concurred in by the Administrator of Veterans Affairs. In explanation thereof, on the floor of the House, Congressman Disney of Oklahoma, the floor manager of the legislation, stated:

> In the Senate there was added to the bill four amendments * * * The first two of these amendments are only clarifications * * *. The third amendment places the parent who last bore that relationship precedence over other parents; in other words, a person who stood in the relationship of loco parentis to the soldier for not less than a year immediately prior to his entrance into the active service would take precedence over a natural parent. [88 Cong. Rec. 5932.] [4]

Additional support is given our construction by the Servicemen's Indemnity Act of 1951. Section 3 of that Act (Appendix, pp. 22-23) provides that "unless designated otherwise by the insured, the term 'parent' shall include only the mother and father who last bore that relationship to the insured." As originally reported to the House, Section 3 permitted payment to more than two parents, all of whom might share in the indemnity at the same time.[5] When the bill reached the Senate Com-

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[4] See also S. Rep. 1430, 77th Cong., 2d sess., which supports the above intention.

[5] Section 3 of H.R. 9911, 81st Cong., 2d sess., which subsequently became Section 3 of the Servicemen's Indemnity Act of 1951, reads:

> * * * The insured shall have the right to designate the beneficiary or beneficiaries of the indemnity within the classes herein provided; to designate the proportion of the principal amount to be paid to each; and to change the beneficiary or beneficiaries without the consent thereof but only within the classes herein provided. If the designated beneficiary or beneficiaries do not survive the insured, or if none has been designated, the Administrator shall make payment of the indemnity to the first

mittee on Finance, Section 3 was amended by the addition of the stipulation that "the term 'parent' shall include only the mother and father who last bore that relationship to the insured."[6] The conclusion is clear that Congress elected a policy of limiting payments under the Act to one paternal parent and one maternal parent.

3. The Court of Appeals also held that the proceeds under the policy must be paid in monthly

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eligible class of beneficiaries according to the order set forth above, and in equal shares if the class is composed of more than one person.

[6] The Administrator of Veterans Affairs sent a letter to the House and Senate Committees expressing his views on the proposed legislation. See Sen. Rep. No. 91, 82nd Cong., 1st Sess., P. 12; H. Rep. No. 6, 82nd Cong., 1st Sess., P. 14. In relation to the provisions originally in Section 3, the Administrator stated:

> It should be noted that an individual may have more than two parents, as that term is defined by the bill, all of whom might share the indemnity at the same time. Thus, adoptive parents who reared a child from infancy would have to share the Government's bounty equally with the natural parents who abandoned the child or with parents who stood in loco parentis for any period however short. Under the National Service Life Insurance Act, insurance is payable only to the parent or parents who last bore that relationship to the insured unless some other parent is designated as beneficiary by the insured. Gratuitous insurance under the mentioned act is payable to a parent only if dependent at the time of death of the insured, and is not payable in any case to a brother or sister. In fact, this provision is a radical departure from all of the existing veterans' laws authorizing gratuitous benefits, insofar as it includes as direct beneficiaries nondependent parents and the new group of brothers and sisters, without regard to dependency.

installments (with 120 months certain) in an amount determined by the age of the first beneficiary at the death of the insured. In so doing, the court erroneously (1) deprived the beneficiary of the valuable right to elect to receive a refund life income which in many instances will yield greater total benefits, and (2) held that this right of election accrued to the first-named beneficiary, rather than to the beneficiary who first *received* payment under the policy.

By the Act of September 30, 1944 (58 Stat. 762), Congress amended Section 602(h)(1) and (2) to authorize the Administrator to provide that a beneficiary may elect a refund life income in lieu of the previously defined modes of payment.[7] By regulations issued in 1944 (38 C.F.R., 1944 Supp., sec. 10.3475), the Administrator in effect inserted this option in every policy under which payments had not commenced prior to September 30, 1944. The option was thus clearly in effect at the date of the insured's death on July 4, 1945. It is to be noted that the apparent basis for this portion of the decision below was the mistaken assumption that Section 602(h)(1) and (2) had not been amended until 1946, after the death of the insured in this case.

[7] Prior to the 1944 amendments, if the beneficiary was under thirty years of age at the time of maturity, payment was in two hundred and forty equal monthly installments; if thirty or over, payment was in one hundred and twenty monthly installments certain, with such payments continuing during the remaining lifetime of such beneficiary. See Appendix, p. 19.

By the regulations which both the original Act and the 1944 amendments empowered the Administrator to make, it was provided that the right to elect to receive a refund life income should be "available only to the beneficiary first receiving payment" (38 C.F.R., 1944 Supp., Sec. 10.3479). Considering the clear Congressional purpose that payments shall be made only to living beneficiaries, it was particularly appropriate for the Administrator to provide that this valuable right of election also should devolve to the first beneficiary who survived to receive payments and that the amount of the monthly installments should be determined by the age of such beneficiary, rather than by the age of a deceased prior beneficiary who had never received payments under the policy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General

DECEMBER 1951.

APPENDIX

1. The pertinent portions of Sections 602 (h), (i), and (j) of the National Service Life Insurance Act of 1940, 54 Stat. 1008, as amended by the Act of July 11, 1942, 56 Stat. 657, the Act of September 30, 1944, 58 Stat. 762, and by the Act of August 1, 1946, 60 Stat. 781, 38 U.S.C. 802, provide as follows:

(h) Insurance maturing prior to the date of enactment of the Insurance Act of 1946 shall be payable in the following manner:

"(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments: *Provided,* That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: * * *.

(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months

certain, with such payments continuing during the remaining lifetime of such beneficiary: *Provided,* That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect, in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount, as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: * * *.

(3) Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—* * *.

(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares; * * *."

(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section and the

insurance shall be payable in equal monthly installments in accordance with subsection (h) (1) or (2), as the case may be. The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h). The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of the Insurance Act of 1946.

(j) No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made, * * *. The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of the Insurance Act of 1946.

2. Section 601(f) of the National Service Life Insurance Act of 1940, as of the date of the insured's death on July 4, 1945, 54 Stat. 1008, as amended by the Act of July 11, 1942, 56 Stat. 657, provided as follows:

(f) The terms "parent", "father", and "mother" include a father, mother, father

through adoption, mother through adoption, and persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year.

3. Section 3 of the Servicemen's Indemnity Act of 1951 (Public Law 23, 82nd Cong., 1st Sess., Chapter 39, effective April 25, 1951), provides as follows:

> Sec. 3. Upon certification by the Secretary of the service department concerned of the death of any person deemed to have been automatically insured under this part, the Administrator of Veterans' Affairs shall cause the indemnity to be paid as provided in section 4 only to the surviving spouse, child or children (including a stepchild, adopted child, or an illegitimate child if the latter was designated as beneficiary by the insured), parent (including a stepparent, parent by adoption, or person who stood in loco parentis to the insured at any time prior to entry into the active service for a period of not less than one year), brother, or sister of the insured, including those of the half-blood and those through adoption. The insured shall have the right to designate the beneficiary or beneficiaries of the indemnity within the classes herein provided; to designate the proportion of the principal amount to be paid to each; and to change the beneficiary or beneficiaries without the consent thereof but only within the classes herein provided. If the designated beneficiary or beneficiaries do not survive the insured, or if none has been

designated, the Administrator shall make payment of the indemnity to the first eligible class of beneficiaries according to the order set forth above, and in equal shares if the class is composed of more than one person. Unless designated otherwise by the insured, the term "parent" shall include only the mother and father who last bore that relationship to the insured.

Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary, if any; otherwise, to the beneficiary or beneficiaries within the permitted class next entitled to priority: *Provided,* That no payment shall be made to the estate of any deceased person.

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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

UNITED STATES OF AMERICA, PETITIONER

v.

CLARA BELLE HENNING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 456

UNITED STATES OF AMERICA, PETITIONER

v.

CLARA BELLE HENNING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 19) is reported at 93 F. Supp. 380. The opinion of the Court of Appeals for the First Circuit (R. 30) is reported at 191 F. 2d 588.

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1951 (R. 38). The petition for a writ of certiorari was filed on November 30, 1951, and was granted on January 28, 1952 (R. 41). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether Section 602 of the National Service Life Insurance Act, which conditions a beneficiary's rights "upon his or her being alive to receive * * * payments" and prohibits payments "to the heirs or legal representatives * * * of any beneficiary", precludes payments to the legal representative of a beneficiary who survived the insured but died before receiving any of the proceeds of the policy.

2. Whether the natural mother of the insured and a foster mother who succeeded to the relationship upon marriage to the insured's divorced father who had custody of the child, may both be regarded as parents "who last bore that relationship" within the meaning of Section 602.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Appendix A, *infra*, pp. 27-33.

STATEMENT

This suit is based upon conflicting claims to the proceeds of a National Service Life Insurance policy in the amount of $10,000 issued to Eugene C. Henning (R. 19). At the time of the insured's death on July 4, 1945, his father, Otto F. Henning, was designated sole beneficiary (R. 18). Otto died some five months later, apparently without having filed a claim to the proceeds (R. 18). Thereafter, Clara Belle Henning, the natural mother of the insured, and Bessie M. Henning, his foster mother,

filed claims with the Veterans Administration (R. 18). The final determination of the Veterans Administration was that Bessie, the foster mother, was entitled to the insurance benefits as the last person to bear the relationship of mother (R. 18-19). Upon the final administrative disallowance of her claim, Clara, the natural mother, brought this action, and Bessie was joined as a party defendant (R. 3, 8). During the litigation, Bessie died and her administrator was substituted (R. 17).

Eugene was born in 1912, the son of Otto and Clara, who separated at about the time of his birth (R. 18). The child and his mother lived in the home of his maternal grandmother until about 1920, when he went to the home of his paternal grandmother (R. 20). From the end of 1922 until the fall of 1926 he lived with a paternal cousin (R. 20).

In 1923 his parents were divorced and the care and custody of Eugene were awarded to the father (R. 20). In 1927 his father married Bessie, and Eugene, who was fifteen years of age at the time, went to live in his father's home (R. 21). The District Court found that, while there, Bessie "treated him with all the customary affection and attention that a mother would bestow on a natural child" (R. 21). She looked after his personal effects, did his laundry and prepared his meals, and a "reasonably close" relationship was established (R. 21). In 1930 he went to live in a board-

ing house with a friend and co-worker (R. 21). After about two years, he and his friend returned to the home of his father and Bessie, and the court found that "the pleasant relationship which had characterized the serviceman's earlier occupancy of that home continued at the time of his second occupancy" (R. 21). Eugene entered military service in November of 1942, and while in the service, he corresponded with his natural mother and sent her presents and photographs of himself (R. 21).

Eugene originally named his wife as beneficiary of his insurance policy and his father as contingent beneficiary (R. 21). In 1944 he made his father sole beneficiary (R. 21).[1] Neither his natural mother nor his foster mother were ever named as beneficiaries or contingent beneficiaries of his policy.

Although he died without receiving any installments of the insurance proceeds, the District Court held that the father, as the designated beneficiary, was entitled to six monthly installments of the insurance proceeds for the period he survived his son, and directed payment to his estate on the ground that the statutory condition that a beneficiary be "alive to receive such payments" required only that he be alive at the time of the insured's death, and not that he be alive actually to receive payment (R. 22-23). It held further

[1] His marriage was subsequently annulled (R. 18).

that "on the basis of conduct" Bessie "'last bore' the status of being *in loco parentis,*" but that Clara "on the basis primarily of blood" also "last bore" the relationship because "a person once tied by blood as a parent to a child always remains a parent" whether she "does or does not desert the child" (R. 22). Accordingly, it ruled that the installments due between the death of Otto and that of Bessie be paid equally to Bessie's estate and to Clara, and that all remaining installments be paid to Clara (R. 22).

The Court of Appeals affirmed the judgment of the District Court with respect to both the award of payments to the estate of deceased beneficiaries and to simultaneous recognition of both the natural mother and foster mother as the parents "who last bore that relationship," although declining to hold "that a natural parent, by that fact alone necessarily remains for life a statutory beneficiary under all circumstances" (R. 33-37).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that the proceeds of a National Service Life Insurance policy may be paid to the estate of a deceased beneficiary.

(2) In holding that two persons may simultaneously stand in the relationship of mother to the insured, under the National Service Life Insurance Act.

(3) In holding that the failure of a named beneficiary, who died before receiving any payments, to make an election of the method of payment of the proceeds of the policy effected a waiver of election with respect to beneficiaries who remain alive to receive the proceeds.

SUMMARY OF ARGUMENT

In holding (1) that the proceeds of a National Service Life Insurance policy maturing before August 1, 1946, may be paid to the estate of a deceased beneficiary, and (2) that a natural mother, not designated as a beneficiary, is entitled to share in the insurance proceeds with a foster mother who last performed the parental role, the court below disregarded the clear statutory language and its legislative history.

Sections 602(i) and (j) (*infra*, pp. 29-30), in unequivocal language, prohibit the payments to the estate of a beneficiary which the court directed to be made. Disregard of the statutory prohibition cannot be justified on the assumption that Congress could not have intended the result reached by a literal reading of the Act's provisions. The legislative history makes clear that Congress was aware of the possibility that in some circumstances no insurance would be paid, and intended just that result. The policy underlying this purpose may be found in the fact that during hostilities the National Service Life Insurance system embodied many gratuitous aspects, the benefits of which Congress wanted to

confer on designated persons or not at all. The apparent harshness of what the court below regarded as an "escheat" of the insurance proceeds disappears when it is realized that unpaid benefits are not paid over to the treasury but remain in the National Service Life Insurance fund. The funds are available for insurance payments on National Service Life Insurance policies and for the payment of dividends where the amount in the fund exceeds the reserves needed for insurance benefits.

Equally erroneous is the court's interpretation of Section 602(h)(3)(C) (*infra*, p. 29) which limits automatic insurance benefit, to the parent or parents "who last bore that relationship." This language by itself would seem sufficient to preclude a natural mother from receiving insurance benefits, in the absence of designation as a beneficiary, where she has been succeeded in the performance of maternal functions by a stepmother. But if the statutory language is not clear beyond doubt, the origin of the language makes it so. The provision was introduced into the statute in 1942 as the result of an amendment recommended by the Administrator of Veterans' Affairs. At the time of the recommendation, it had been the consistent administrative practice under comparable statutes to displace the rights of a natural parent by those of a foster parent who last exercised parental responsibilities. The amendment was proposed to accomplish the same result with respect to National Service Life Insurance, and the legislative materials show that Congress was fully aware of this purpose.

The Government's position on both of these questions is confirmed by the fact that in the Servicemen's Indemnity Act of 1951, providing free insurance for servicemen during the period of military service, Congress reiterated (1) that installment insurance payments shall not be paid to the estates of beneficiaries and (2) that insurance benefits shall be paid, in the absence of a designation of a beneficiary, only to the parent, including a person *in loco parentis*, who last exercised the parental relationship.

ARGUMENT

I

The National Service Life Insurance Act Forbids Payment of Insurance Benefits to the Estate of a Deceased Beneficiary

The decision of the court below approves awards to the estate of Otto Henning of insurance payments, for the period between the death of the insured and the subsequent death of Otto Henning, which were not paid during his life, and to the estate of Bessie M. Henning of insurance payments, for the period between the dates of Otto Henning's death and her death, which were not paid during her life. We contend that it is only by disregarding clear and explicit statutory provisions that payment of the insurance proceeds can be made to the estates of deceased beneficiaries. The Act unequivocally makes the payment of insurance installments conditional upon the bene-

ficiaries remaining alive to receive them. Section 602 (i) (38 U.S.C. 802 (i)) specifically states that—

> The right of any beneficiary to payment of any installments shall be condifioned upon his or her being alive to receive such payments.

If any ambiguity lurks in this language to permit its interpretation as requiring only that the beneficiary be alive at the time of the insured's death, as held by the court below, it is dissipated by the statutory provision immediately following, to the effect that—

> No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority. * * *

Despite the clarity of the Congressional intention embodied in these provisions—with respect to which the court below acknowledged, "It is certainly true that the literal wording of the statute goes a long way towards sustaining the Government's contention" (R. 34)—the Act goes even further and provides in Section 602 (j) (38 U.S.C. 802 (j)) that—

> No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary. * * *

Both courts below were of the view that giving effect to the plain import of the statutory language might have the effect of denying to beneficiaries benefits to which they were entitled and did not receive by virtue of sheer happenstance. Whether this result is desirable or not, it seems clear from the statutory language that Congress intended it. This is not a situation where the literal application of a statute to some unforeseen set of circumstances accomplishes a weird result which Congress cannot be deemed to have intended. See, *e.g.*, *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543. The circumstances encountered here are neither unusual nor unforeseeable. This is evidenced by the number of cases in which the problem has arisen, which represent but a small proportion of the situations in which the same question has been disposed of administratively. See *Baumet* v. *United States*, 177 F. 2d 806 (C.A. 2); *Washburn* v. *United States*, 63 F. Supp. 224 (W.D. Mo.); *Carpenter* v. *United States*, 72 F. Supp. 510 (W.D. Pa.); *Brackeen* v. *United States*, (N.D. Texas, July 26, 1951).

In fact, it seems that Congress had this precise situation in mind when it used such language as "no person shall have a vested right to any installment * * * not paid * * * during such beneficiary's lifetime" and "no installments * * * shall be paid to the heirs or legal representatives * * * of any beneficiary." Thus, however un-

wise the Congressional judgment might seem, it is plain and must be given effect.

Examination of the background and purposes of the legislation, as originally enacted, discloses that these provisions do not accomplish untoward results. On the contrary, they carry out the purposes of the statute. It will be recalled that the statute, as originally enacted and until 1946 (see *infra*, pp. 14-15), narrowly defined the permitted class of beneficiaries under National Service Life Insurance policies. Section 602(g), 38 U.S.C. 802 (g). In enacting this insurance program for servicemen, the Congress assumed large obligations to provide benefits for a limited class which it believed entitled to compensation in the event of the serviceman's death. Thus "Congress specified that the United States would bear the administrative costs of the insurance system, excess mortality and disability cost resulting from the extra hazards of war, and the cost of reimbursing the reserve fund for waiving recovery of benefit payments erroneously made where it would be inequitable to require repayment." *United States* v. *Zazove*, 334 U.S. 602, 616.[2] Furthermore, the statute provided that certain servicemen who died in the line of duty without having insurance at the time of their death would be deemed to have had insurance payable to

[2] See 38 U.S.C. 802 for other specified costs to be borne by the United States. To date the costs to the United States have far exceeded the payments out of the insurance funds.

designated beneficiaries. Section 602 (d)(2), 38 U.S.C. 802(d)(2).

In assuming this large financial burden, Congress had a wholly understandable interest in limiting the objects of its bounty, and it did so in the statute. In view of its careful enumeration of the permitted beneficiaries, there is no reason to believe that it intended either the estate, the heirs, or the creditors of beneficiaries to receive insurance proceeds if the designated statutory beneficiaries were not alive to receive them. In fact, the Congressional purpose in so defining the permitted class of beneficiaries would be thwarted if payments were made to any others.

It may be unfortunate, as the courts below pointed out, if conflicting claims result in the withholding of payment from the proper beneficiary. But the misfortune is in the failure of the beneficiary to receive the payment intended for *him*. The decision below, however, does not correct this misfortune by directing payments to the beneficiary's estate which will result in their being received by persons who are not eligible beneficiaries under the statutory prescription.

In interpreting the statute to permit payments to a beneficiary's estate, the court below sought to prevent "the making of profits for the Government escheat" (R. 33, 35) through the failure of beneficiaries. This effort, however, reflects a disregard of explicit statutory language and a mis-

understanding of the operation of the National Service Life Insurance system. Section 602 (j) [38 U.S.C. 802(j)] specifically provides—

> in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made * * *.

Thus, the court sought to avoid a result which Congress expressly provided should occur.

Moreover, contrary to the view of the courts below, the Government does not profit by escheat (R. 35) and the money does not remain in the Treasury of the United States (R. 23). All premiums paid on the policies are retained in the National Service Life Insurance Fund which is used for payments on matured policies. To the extent that the resources in the Fund exceed the needs for insurance payments, they are paid as dividends on policies. Thus the failure to make payments outside the class of designated beneficiaries does not enrich the Government but, instead, benefits the servicemen and ex-servicemen who are the holders of National Service Life Insurance policies.

If additional evidence is necessary to demonstrate that Congress understood exactly what it was doing when it provided for payments to designated persons and no others, this is supplied by the legislative history and subsequent legislative developments.

In enacting the National Service Life Insurance Act of 1940, the draftsmen had the benefit of the experience of the World War Veterans' Act of 1924, 43 Stat. 607, which provided for the payment to the beneficiary's personal representatives of accrued installments of insurance unpaid at the time of his death (Section 26, 38 U.S.C. 451) and to the estate of the insured of the present value of all unmatured installments (Section 303, 38 U.S.C. 514). In view of the express provisions in the 1924 Act, which Congress used as a model in drafting the benefit provisions of the 1940 Act (*United States* v. *Zazove,* 334 U. S. 602, 617-619), for the payment to the beneficiary's estate of installments accrued, but unpaid, during the lifetime of the beneficiary (*McCullough* v. *Smith,* 293 U. S. 228, *Singleton* v. *Cheek,* 284 U. S. 493), the omission of similar provisions from the National Service Life Insurance Act of 1940 emphasizes Congress' intention to limit insurance benefits to living beneficiaries.

The 1946 amendments to the National Service Life Insurance Act evidence Congress' clear understanding of the restrictions on payments previously imposed. After hostilities had ceased and the National Service Life Insurance system began to assume more of the aspects of an ordinary commercial insurance scheme, the prohibitions contained in Section 602(i) and (j) [38 U. S. C. 802 (i) and (j))] were deliberately curtailed, prospectively only, by the addition to each section of the provision that it "shall not be applicable to insurance maturing on or after the date of enact-

ment of the Insurance Act of 1946 [August 1, 1946]".[3] Sec. 5(b), Act of August 1, 1946, 60 Stat. 781, 783. Payment of insurance proceeds to the estates of deceased beneficiaries and the insured was specifically authorized in certain circumstances. Sec. 602(u), 38 U.S.C. 802 (u) (*supra*, p. 30).[4] Congressman Rankin explained the changes in these terms (92 Cong. Rec. 6170):

> Under existing law, if there is no person within the permitted class of beneficiaries above specified living to receive payments of insurance, no payments are made.

The Servicemen's Indemnity Act of 1951 (Public Law 23, 82d Cong., 1st sess.) confirms the Con-

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[3] See testimony of Mr. Harold W. Breining, Assistant Administrator for Insurance, Veterans Administration, Hearings before the Subcommittee on Insurance of the Committee on World War Veterans' Legislation, House of Representatives, 79th Congress, Second Session, on H.R. 5772 and H.R. 5773, as follows (p. 1):

> The fundamental reasons for liberalization are that during the war the bulk of losses all came from the National Treasury. Through this method the Government assumed the losses due to the extra hazards of military and naval services. Since the Government during the war bore the major part of the losses it was not felt that the Government would want to pay, indirectly through this channel, large sums of money to persons who might be beneficiaries only because of some speculation, or because the insured might wish to give it to them as distinguished from persons who were likely to be dependent or to whom the insured might owe some semblance of a moral obligation. These restrictions originally were placed in the law with the clear intent that they would be eliminated when the period of emergency was over.

[4] Even under this provision, except where the beneficiary is entitled to choose a lump sum settlement, accrued but unpaid installments of insurance benefits may not be paid to estates of beneficiaries. 38 U.S.C. (Supp. IV) 802(u).

gressional policy of limiting "beneficiaries to the survivors in the immediate family of the insured" (S. Rep. 91, 82d Cong., 1st sess., p. 8) where governmental gratuity plays a major role in the insurance plan. This statute, which awarded free life insurance in the amount of $10,000 to servicemen during the period of military service, reestablished the principle of permitting payments only to authorized beneficiaries alive to receive them, by the following provision (Section 3):

> Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary, if any; otherwise, to the beneficiary or beneficiaries within the permitted class next entitled to priority: *Provided*, That no payment shall be made to the estate of any deceased person.

Readoption of this principle in circumstances comparable to those which surrounded the enactment of the National Service Life Insurance Act convincingly evidences deliberate Congressional policy rather than the "unfortunate" and "not purposeful" use of language assumed by the court below (R. 34).[5]

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[5] At least four district courts have experienced no difficulty in giving the statutory language its natural and literal meaning to deny payment of insurance proceeds to the estates of surviving but deceased beneficiaries. *Washburn* v. *United States*, 63 F. Supp. 224 (W.D. Mo.); *Carpenter* v. *United States*, 72 F. Supp. 510 (W.D. Pa.), reversed on other grounds, 168 F. 2d 369 (C.A. 3); *Baumet* v. *United States*, 81 F. Supp. 1012 (S.D. N.Y.), reversed, 177 F. 2d 806 (C.A. 2); *Brackeen*

The effect of the judgment below is (1) to require the payment of insurance benefits to a beneficiary who is not alive to receive them, despite the statute's conditioning the rights of any beneficiary upon his "being alive to receive such payments", (2) to recognize a vested right in beneficiaries to unpaid installments, despite the statutory provision that "no person shall have a vested right to any installment or installments of any such insurance," and (3) to permit the payment of insurance proceeds to the legal representatives of deceased beneficiaries, despite the statutory language that "no installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary." See *infra*, pp. 29, 30. The present case would seem to present a peculiarly appropriate occasion for application of the time honored and recently reiterated rule that if the results achieved by the statutory language seem undesirable, the remedy is for Congress and not for the courts. See, *e.g.*, *Pillsbury v. United Engineering Co.*, 342 U. S. 197, 200.

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v. *United States*, N.D. Texas (July 26, 1951). Moreover, the consistent administrative construction, presumably known to Congress, has been to deny such payments, a practice which has controlled the settlement of many claims. This administrative practice is itself entitled to great weight and should not be overturned except for the most compelling reasons.

II

A Natural Mother, Unless Designated as a Beneficiary by the Insured, Cannot Take as a Parent Where a Foster Parent "Last Bore That Relationship"

The court below held, with the District Court, that upon the death of Otto Henning, who was the only beneficiary designated by the insured, Clara, the natural mother, was entitled to share the proceeds of the policy equally with Bessie, the foster mother. Subsection (3)(C) of Section 602(h) [38 U.S.C. 802(h)] provides that if no widow, widower, or child survive, payment shall be made—

> to the parent or parents of the insured who last bore that relationship, if living, in equal shares * * *.

The District Court held that the natural mother of the insured is a mother " 'first,' 'last', and all the time" (R. 22, 36), so that she was entitled to share in the proceeds of the policy equally with the foster mother of the insured, notwithstanding the fact that the latter was the maternal parent "who last bore that relationship" to the insured within the meaning of Section 602(h)(3)(C).[8] The Court of Appeals affirmed with the qualification that (R. 37) "It may be that a natural parent who has voluntarily for some selfish reason abandoned all pa-

[8] Section 601(f) (38 U.S.C. 801(f)), at the date of the insured's death, defined the terms "parent," "father," and "mother" as including " * * * persons who have stood *in loco parentis* to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year."

rental responsibility cannot be heard to assert his or her parenthood only for the purpose of collecting insurance benefits." We submit that this result disregards the specific statutory command that only the "parents of the insured who last bore that relationship," shall be entitled to the proceeds of the policy.

The legislative history of the amendment by which Congress added the words "who last bore that relationship" to Section 602(h)(3)(C) reveals that it specifically rejected the view that a natural parent is always a "parent" for the purposes of the Act, but rather intended benefits of insurance passed by devolution to be payable only to the one mother or father who last *exercised* the parental relationship, even to the exclusion of a natural parent. The quoted language was added in Section 9 of the Act of July 11, 1942 (56 Stat. 657) by a committee amendment in the Senate upon the recommendation of the Administrator of Veterans' Affairs. See H. Rep. 2312, 77th Cong., 2d Sess., p. 4. This recommended change was made against a consistent administrative background of distributing benefits in accordance with the interpretation of the statute urged here. See letter of the Administrator of Veterans' Affairs, Appendix B, *infra*, pp. 33-38. See also Administrator's Decision No. 510, 1 Dec. of Administrator of Veterans' Affairs, p. 767; Adm. Dec. 792, 1 Dec. of Administrator of Veterans' Affairs (Supp. 3), p. 13. In explanation thereof, on the floor of the House,

Congressman Disney of Oklahoma, the floor manager of the legislation, stated:

> In the Senate there was added to the bill four amendments * * *. The first two of these amendments are only clarifications * * *.
>
> The third amendment places the parent who last bore that relationship precedence over other parents; in other words, a person who stood in the relationship of loco parentis to the soldier for not less than a year immediately prior to his entrance into the active service would take precedence over a natural parent. [88 Cong. Rec. 5932.]

Similarly, the Senate Report accompanying the 1942 Amendment explains that only a person "who last bore *and exercised the parental relationship may be paid as beneficiary*". (Italics supplied, S. Rep. 1430, 77th Cong., 2d Sess., p. 2).[7]

The express language of the 1942 amendment was given effect by th Court of Appeals for the

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[7] The full discussion in the Senate Report follows:

> Sections 7 to 9 are for the purpose of clarifying the existing legislation pertaining to the permitted class of beneficiaries, with particular reference to the terms "parent," "father," and "mother".
>
> These terms as used in the original act and the amendment of December 20, 1941, are not defined. As a result it could be held that only natural parents are included notwithstanding that in a given case the soldier may have been deserted by the natural parents and have been raised and supported wholly by an adoptive parent or parents. It is intended that they may be designated by the insured and that in case of automatic benefits, failure of designation or death of beneficiary, a person within the class as defined who last bore and exercised the parental relationship may be paid as beneficiary. Sections 8 and 9 are merely perfecting changes in existing law to conform to such intent.

Second Circuit in *Baumet* v. *United States*, 191 F. 2d 194, now pending before this Court on petition for a writ of certiorari, No. 203 Misc., where the succession of a stepfather to the status of a father to the insured was held to exclude the natural father from the class of non-designated statutory beneficiaries, even after the death of the stepfather. Referring to the effect of "the limiting clause 'who last bore that relationship'," the court said (pp. 196-197):

> The insured can have but one maternal parent and one paternal parent. Since Section 801 (f) recognizes a person *in loco parentis* as a parent, the parents of William Baumet, Jr., at the time of his enlistment were Julie Peters, his foster mother, and John Peters, his foster father. Hence John Peters was the paternal parent who last bore that relationship to the insured, and the appellant [the natural father] cannot satisfy the statutory requirement.

Consequently, the foster mother was held entitled to all of the insurance proceeds.

The Court of Appeals for the Tenth Circuit in *Leyerly* v. *United States*, 162 F. 2d 79, also reached the conclusion that under the amended statutory language, parents *in loco parentis* are entitled to the proceeds of a policy where they displaced the natural parents in performing the parental role because illness prevented the natural parents from continuing in the capacity. In so holding, the court

stressed the significance of actually performing the parental function, pointing out that Congress wanted to "make sure" that recognition as beneficiaries would be given to persons "who last bore *and exercised* the parental relationship" and "that Congress contemplated a relationship or status based upon facts, and not upon the circumstances of birth" (p. 85).

Additional support for the Government's construction is found in the Servicemen's Indemnity Act of 1951. Section 3 of that Act, which likewise defines "parent" as including a "person who stood *in loco parentis* to the insured" (Appendix, p. 32), provides that "unless designated otherwise by the insured, the term 'parent' shall include only the mother and father who last bore that relationship to the insured." As originally reported to the House, Section 3 did not contain limiting language comparable to that involved here.

In a letter to the House and Senate Committees with respect to this provision (see S. Rep. No. 91, 82nd Cong., 1st Sess., p. 12; H. Rep. No. 6, 82nd Cong., 1st Sess., p. 14), the Administrator of Veterans Affairs stated:

> It should be noted that an individual may have more than two parents, as that term is defined by the bill, all of whom might share the indemnity at the same time. Thus, adoptive parents who reared a child from infancy would have to share the Government's bounty equally with the natural parents who aban-

doned the child or with parents who stood in loco parentis for any period however short. Under the National Service Life Insurance Act, insurance is payable only to the parent or parents who last bore that relationship to the insured unless some other parent is designated as beneficiary by the insured.

When the bill reached the Senate Committee on Finance, Section 3 was amended to add that "the term 'parent' shall include only the mother and father who last bore that relationship to the insured." Thus, Congress has consistently declared that where a natural and an adoptive parent successively occupy that relationship, it intends insurance benefits to devolve (in the absence of a designation) only to the last person to occupy the role of parent, even to the exclusion of a natural parent.

The apparent basis for the decision below was the court's fear that in some circumstances a worthy but unfortunate natural parent would be excluded from a share in insurance benefits, to the advantage of a foster parent. There is no reason to believe that this will happen with sufficient frequency to justify ignoring the unambiguous statutory provision. It will be noted that Section 602(h)(3) prescribes the order in which close relatives of the insured shall receive insurance benefits only where the insured has failed to designate beneficiaries and the order in which he desires them to receive benefits. The

insured is free to designate a natural parent to the exclusion of a foster parent, or to divide the benefits between them. The insured is in a better position than courts or administrators to determine whether his relationship with a natural parent should be recognized in the disposition of insurance benefits. His failure to designate his natural parent as a beneficiary presumably reflects indifference, particularly when other persons have been acting *in loco parentis* towards him. It is only where insured fails to designate which "parents" are to receive insurance benefits that the Act provides that they shall go to the parents "who last bore" that relationship to him. This is entirely consistent with the general statutory policy of channeling insurance benefits to close relatives who, if not actually dependent upon the insured, are at least potential dependents. Obviously, where, as in this case, there have been successive parental relationships, the "parent or parents who last bore that relationship to the insured" or, as the Senate Committee put it, "who last bore and exercised the parental relationship," is most likely the "parent" towards whom the insured would feel an obligation to support.[8] In

[8] It should also be noted that if the parent "who last bore" that relationship predeceases the insured, then, the insurance benefits devolve to the brothers and sisters of the insured. If his relationship with his natural parent has been so attenuated that another person has acted *in loco parentis*, it is not unlikely that the relationship of the insured with his brothers and sisters will in fact be closer than that with the natural but superseded parent.

any event, any apparent hardship in an occasional case resulting from the statutory order of devolution is no different from that which may sometimes result from the prescribed order of devolution under general intestacy statutes.

Under the decision below, a foster parent who satisfies the statutory requirement, in order to obtain the insurance benefits which Congress intended should devolve to such parent, must also prove that the natural parent "has voluntarily for some selfish reason abandoned all parental responsibility." But as noted above, the Congress clearly intended that insurance benefits should devolve only to the parent who has last actively performed the parental function. Thus, even an involuntary relinquishment of parental responsibility, as by insanity in the *Leyerly* case, is within the statutory command that the foster parent who assumes the responsibility shall become entitled to the insurance benefits. Moreover, the court below, in drawing distinctions between voluntary and involuntary, and selfish and unselfish, relinquishment of parental responsibility by the natural parent, has introduced concepts which will be difficult for administrators and courts to apply. We urge that this result violates the clear statutory purpose of providing a simple and usually fair arrangement for the devolution of insurance benefits in cases where the insured has failed to designate beneficiaries.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.[9]

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
SAMUEL D. SLADE,
MORTON LIFTIN,
Attorneys.

MARCH, 1952.

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[9] The court below entertained some doubt as to the existence of a right of election by the beneficiary as to the method of payment of the insurance proceeds under the instant policy, apparently because of the mistaken assumption that the statutory amendment authorizing the Administrator to provide the right of election was enacted in 1946, after the death of the insured (R. 37-38). The amendment was in fact passed in 1944 (58 Stat. 762), and, pursuant to regulations of the Administrator (38 CFR (1944 Supp.) 10.3475), the option was made available with respect to every policy under which payment had not commenced prior to September 30, 1944. The option therefore existed when the present policy matured in 1945. The court's view that any right of election was available only to the first beneficiary is in accord with the administrative regulation that the right to elect a refund life income is "available only to the beneficiary first receiving payment" (38 CFR (1944 Supp.) 10.3479). Its ruling that Otto was entitled to make the election rested on its conclusion that payments should be made to his estate and that this made him the first beneficiary for that purpose. If the Court should adopt the Government's interpretation of the statute, however, no eligible beneficiary remains alive to receive payments and the proceeds remain in the insurance trust fund available for dividends and payments on policies. If the Court should rule that a beneficiary must be alive to receive payments, but that Clara is an eligible beneficiary, then Clara as the first beneficiary actually receiving payment should exercise the election and payments should be based upon her age at the death of the insured. Sec. 602(h)(1) and (2), 38 U.S.C. 802(h)(1) and (2).

APPENDIX A

The pertinent portions of the National Service Life Insurance Act of 1940, 54 Stat. 1008, as amended by the Act of July 11, 1942, 56 Stat. 657, the Act of September 30, 1944, 58 Stat. 762, and by the Act of August 1, 1946, 60 Stat. 781, 38 U.S.C. 801, *et seq.* provide as follows:

Section 601.

(f) The terms "parent", "father", and "mother" include a father, mother, father through adoption, mother through adoption, persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year, and a stepparent, if designated as beneficiary by the insured.

Section 602.

(g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: *Provided,* That the provisions of this subsection as to the restricted permitted class of beneficiaries shall not apply to any national service life-insur-

ance policy maturing on or after the date of enactment of the Insurance Act of 1946 [August 1, 1946].

(h) Insurance maturing prior to the date of enactment of the Insurance Act of 1946 shall be payable in the following manner:

(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments: *Provided,* That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: * * *.

(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary: *Provided,* That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect, in lieu of this mode of payment and prior to the commencement of payments, a refund

life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: * * *.

(3) Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order— * * *.

* * * * *

(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares; * * *."

* * * * *

(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section and the insurance shall be payable in equal monthly installments in accordance with subsection (h) (1) or (2), as the case may be. The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insur-

ance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h). The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of the Insurance Act of 1946.

* * * * *

(j) No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made, * * *. The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of the Insurance Act of 1946.

(u) With respect to insurance maturing on or subsequent to the date of enactment of the Insurance Act of 1946, in any case in which the beneficiary is entitled to a lump-sum settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable under such mode of settlement, the present value of the remaining unpaid amount shall be payable to the estate of the beneficiary; and in any case in which no beneficiary is designated by the insured, or the designated beneficiary does not survive the insured, or a designated beneficiary not entitled to choose a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, the commuted value of

the insurance remaining unpaid shall be paid in one sum to the estate of the insured: *Provided,* That in no event shall there be any payment to the estate of the insured or of the beneficiary of any sums unless it is shown that any sums paid will not escheat.

Section 602 (u) was Amended in 1949 (63 Stat. 74, 38 U.S.C. (Supp. IV) 802(u)) to read as follows:

(u) With respect to insurance maturing on or subsequent to the date of enactment of the Insurance Act of 1946 [August 1, 1946], in any case in which the beneficiary is entitled to a lump-sum settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable under such mode of settlement, the present value of the remaining unpaid amount shall be payable to the estate of the beneficiary; and in any case in which no beneficiary is designated by the insured, or the designated beneficiary does not survive the insured, or a designated beneficiary not entitled to a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance (whether accrued or not) shall be paid in one sum to the estate of the insured: *Provided,* That in no event shall there be any payment to the estate of the insured or of the beneficiary of any sums unless it is shown that any sums paid will not escheat.

Section 3 of the Servicemen's Indemnity Act of 1951 (Public Law 23, 82nd Cong., 1st Sess., Chap-

ter 39, effective April 25, 1951), provides as follows:

> Sec. 3. Upon certification by the Secretary of the service department concerned of the death of any person deemed to have been automatically insured under this part, the Administrator of Veterans' Affairs shall cause the indemnity to be paid as provided in section 4 only to the surviving spouse, child or children (including a stepchild, adopted child, or an illegitimate child if the latter was designated as beneficiary by the insured), parent (including a stepparent, parent by adoption, or person who stood in loco parentis to the insured at any time prior to entry into the active service for a period of not less than one year), brother, or sister of the insured, including those of the half-blood and those through adoption. The insured shall have the right to designate the beneficiary or beneficiaries of the indemnity within the classes herein provided; to designate the proportion of the principal amount to be paid to each; and to change the beneficiary or beneficiaries without the consent thereof but only within the classes herein provided. If the designated beneficiary or beneficiaries do not survive the insured, or if none has been designated, the Administrator shall make payment of the indemnity to the first eligible class of beneficiaries according to the order set forth above, and in equal shares if the class is composed of more than one person. Unless designated otherwise by the insured, the term "parent" shall include only the mother and father who last bore that relationship to the insured.

Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary, if any; otherwise, to the beneficiary or beneficiaries within the permitted class next entitled to priority: *Provided,* That no payment shall be made to the estate of any deceased person.

APPENDIX B

VETERANS ADMINISTRATION
WASHINGTON 25, D. C.

Mar. 12, 1952.

Office of Solicitor

Your File Reference:
In Reply Refer to: 2FB

Honorable Philip B. Perlman
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

MY DEAR MR. PERLMAN:

This refers to your recent request, in connection with the case of *United States* v. *Henning* in which certiorari has been granted, for an authoritative statement of the administrative practice followed by the Veterans Administration in the application of § 602, particularly subsections (h), (i), and (j), of the National Service Life Insurance Act of 1940, as amended (38 USCA § 802(h)(i) and (j)). You have specifically requested a statement as to the practice followed with respect to subsection (h)(3)(C), as amended by § 9 of P.L. 667, 77th

Congress, approved July 11, 1942, 56 Stat. 657, which inserted the words "who last bore that relationship" after the phrase "parent or parents of the insured" and before the phrase "if living, in equal shares".

The files of the Veterans Administration reflect that the amendments to the National Service Life Insurance Act of 1940, which became P.L. 667, 77th Congress, were (with the exception of § 10) drafted in and proposed by the Veterans Administration. Committee Report 2312, House of Representatives, 77th Congress, Second Session, at page 4, reflects that §§ 7 to 10, inclusive, of the bill were added as amendments to S. 2543 by the Committee on Finance of the United States Senate, and were recommended by the Administrator of Veterans Affairs. Since the Committee's comments are fully set forth in Administrator's Decision 510, February 18, 1943, which reflects the view of the Veterans Administration as to the effect to be given to the above amendment, no further comment appears necessary with regard to the report.

The proposal by the Veterans Administration that the language "who last bore that relationship" be inserted in subsection 602(h)(3)(C) resulted from the experience which it and its predecessor agencies gained in the administration of the War Risk Insurance Act and the World War Adjusted Compensation Act, each of which, so far as here material, contained language almost identical with that appearing in the National Service Life Insurance Act except that they did not contain the quoted clause. Because of the absence in

these prior statutes of limiting language like that appearing in the quoted clause, it became necessary to resolve administratively conflicts between parents who claimed either through natural or through assumed relationship with the result that, as reflected in an opinion of the General Counsel of the Veterans Bureau dated February 3, 1927, subsequently approved in Director's Decision No. 289, dated March 9, 1927, a copy of the latter of which is attached, priority was given to the parent or parents *who last bore that relationship.* Difficulties in the administration of these laws without limiting language designed to displace or exclude parents who did not last bear the relationship are reflected by numerous opinions and decisions, of which the following are typical: 27 Comp. Dec. 165, dated August 16, 1920; 27 Comp. Dec. 281, dated September 24, 1920; and 17 Comp. Gen. 843, dated April 15, 1938. To eliminate such difficulties in the administration of the National Service Life Insurance Act the proposal was made that the words "who last bore that relationship" be added. This proposal, of course, was adopted by the Congress, although the committee reports fail to reflect the reasons as fully as herein stated.

It has been the consistent administrative practice of the Veterans Administration in National Service Life Insurance cases involving a failure on the insured's part to designate a beneficiary, or in cases where a designated beneficiary dies before receiving payment, or in cases where an attempted designation is of a person not within the permitted class of beneficiaries defined in § 602(g) of the Act, to award the unpaid installments to

the person or persons within the permitted classes defined in § 602, subsection (h)(3), in the order of priority therein specified, where no different order was designated by the insured. Subsection (i) of § 602 has been consistently construed as requiring this disposition and as requiring the conclusion that no person shall have a vested right to any installment of such insurance and that any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority as provided in subsection (h). Accordingly, the consistent administrative practice has been to the effect that, by virtue of provisions of subsections (i) and (j) of § 602, installments which accrue but are not paid to a beneficiary during his lifetime cannot be paid to the estate or heirs of such beneficiary.

Subsection (j) has been consistently construed by the Veterans Administration as prohibiting any payment at all "in the event that no person within the permitted class survives to receive the insurance", except in the case of converted insurance, as to which special provision was made by the amendment to the original Act effected by § 1 of P.L. 452, 78th Congress, September 30, 1944, 58 Stat. 762-4.

The foregoing statement refers to cases wherein insurance matured prior to August 1, 1946. It is to be observed, of course, that the statutory language establishing a restricted class of beneficiaries was, by P.L. 589, 79th Congress, August 1, 1946, made inapplicable to insurance maturing thereafter, and that other provisions, particularly § 602(u), 38 USC § 802(u), were made in respect to the distribution of such insurance.

It is believed that the foregoing is the information which you desire.

Very truly yours,

EDWARD E. ODOM,
Solicitor.

March 9, 1927.

DIRECTOR'S DECISION, UNITED STATES VETERANS' BUREAU, No. 289

SUBJECT: Preference of persons coming within the definition of mother and father in the payment of World War Adjusted Compensation benefits.

QUESTION PRESENTED: Application for benefits has been made by the adopted mother and the natural mother of the deceased and the question arises as to which of the claimants is entitled to payment.

FACTS: Applications for Adjusted Compensation benefits have been filed by one person as the mother by adoption of the deceased and by a second person as the natural mother. The records indicate that death compensation benefits were awarded to the mother by adoption and payment continued under such award until July 31, 1925, at which time an investigation was made and it was determined that the mother by adoption was not in fact dependent.

COMMENT: Since the language of the World War Adjusted Compensation Act is substantially the same as that used in the War Risk Insurance Act, which has been the subject of consideration by the Comptroller General and by this Bureau, it follows that the procedure heretofore adopted in connection with the payment of automatic insurance

should be followed in connection with the payment of adjusted service credits when that benefit is provided for dependent parents. Payments to parents are subject to the provisions of Section 602 (c) of the World War Adjusted Compensation Act, as amended July 3, 1926.

HELD: Where both the natural and adopted mothers of a deceased veteran apply for the benefits of the dependency allowance under the Adjusted Compensation Act, payment should be made to the woman who last bore the relationship of "mother" to the person in the military service; as de facto mother she takes precedence over other persons who may be included within the definition of the term "mother". To illustrate, if an adoptive mother or a stepmother or a foster mother last bore relationship of "mother" to the person in the military service, such person would take preference to payment under the Adjusted Compensation Act to a natural mother, if otherwise entitled. (Opinion of the General Counsel, February 3, 1927, C-339 991, A-33,210).

The foregoing decision is hereby promulgated for observance by all officials and employees of the United States Veterans' Bureau.

(S.) FRANK T. HINES,
Director.

U. S. GOVERNMENT PRINTING OFFICE 1927

[illegible]ARY
SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED
MAR 24 1952
CHARLES ELMORE CROPLEY
Clerk

Supreme Court of the United States.

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No. [illegible]

October Term, 195[illegible]

UNITED STATES OF AMERICA,
Petitioner,

v.

CLARA BELLE HENNING et al.,
Respondents.

On Writ of Certiorari to United States Court of Appeals for the First Circuit.

BRIEF OF JOSEPH S. KENNEDY, ADMINISTRATOR OF THE ESTATE OF BESSIE M. HENNING, AND ADMINISTRATOR D.B.N. OF THE ESTATE OF OTTO F. HENNING, RESPONDENT.

[illegible] V. GETCHELL,
Attorney for Joseph S. Kennedy,
Administrator, Estate of Bessie M. Henning, and Administrator d.b.n., Estate of Otto F. Henning,
Respondent.

[illegible]
[illegible]
[illegible]
[illegible]
Of Counsel.

[illegible] LAW PRINTERS, [illegible]

Subject Index.

Table of Authorities Cited.

Cases.

STATUTES.

PUBLIC DOCUMENTS.

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 456.

UNITED STATES OF AMERICA,
Petitioner,
v.
CLARA BELLE HENNING ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF JOSEPH S. KENNEDY, ADMINISTRATOR OF THE ESTATE OF BESSIE M. HENNING, AND ADMINISTRATOR D.B.N. OF THE ESTATE OF OTTO F. HENNING, RESPONDENT.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit (R. pp. 42-50) is reported in 191 F. (2d) 588.

Grounds of Jurisdiction.

This is an action arising under the laws of the United States, 38 U.S.C. c. 13, §§ 801-802. It comes to this Court on petition for writ of certiorari to the United States Court of Appeals for the First Circuit under 28 U.S.C. § 1254.

Statement of the Case.*

This is a case of interpleader between claimants for the proceeds of a policy of National Service Life Insurance. Eugene C. Henning, a sailor in the Navy, died July 4, 1945, holder of a policy for $10,000, in which his father, Otto F. Henning, was named as beneficiary. The father died five months later, December 8, 1945, without having completed a claim to the insurance.

Following Otto's (the father's) death, his widow, Bessie Henning (stepmother of the sailor), and his divorced former wife, Clara Henning (natural mother of the sailor), made claims for the proceeds to the Veterans Administration. The Administration, after investigation, awarded the proceeds to the stepmother, Bessie, as the last person *in loco parentis*. In October, 1948, before any payments were made, Clara, the natural mother, filed a complaint against the Government, and the latter interpleaded Bessie, the stepmother. Bessie filed an answer for herself and also as administratrix of the estate of her husband Otto. On June 30, 1949, before the case was reached for trial, Bessie died. Her administrator, Joseph S. Kennedy, was substituted as a party, representing the estates of both Otto and Bessie.

At the trial in the District Court the trial judge found as a fact that the sailor Eugene had been on friendly terms with both women. He lived with his natural mother, Clara, at the home of her mother, until he was eight (R. 20). After that he lived with his father and his stepmother, Bessie, from age fifteen until age twenty-nine, except for about two years when he was aged nineteen and twenty, during which he lived at a boarding house near his work (R. 21). "His stepmother [Bessie] treated him with all the customary affection and attention that a mother would

*This brief had to go to press before petitioner's brief was received, hence reference to facts as stated therein is not possible.

bestow on a natural child. She took care of his personal effects, did his laundry and furnished his meals which were no doubt paid for largely by the father" (R. 21).

Upon these facts the trial judge ordered payments made (A) to the administrator of Otto, the father, representing the instalments due during the five-month period by which Otto survived his son; (B) payments divided equally between Bessie's estate and Clara, for the period of forty-two and a half months during which Bessie survived Otto, and (C) the balance to Clara, for the period following Bessie's death in June, 1949.

Although Bessie's representative had in fact claimed the entire proceeds payable during the period (B) of forty-two months up to the death of Bessie on June 30, 1949, he did not appeal, being without funds for appellate expenses. The Government nevertheless prosecuted an appeal, which has now reached this Court.

Specification of Errors.

This respondent contends as to the questions raised on the petition for certiorari—

1. That the court below was correct in ordering payments under 38 U.S.C. § 801 et seq., National Service Life Insurance Act, upon the matured policy, to the administrator of the estates of beneficiaries who were alive when payments were due under the policy but who died before receiving actual payment.

2. That the court below was in error in ordering payments under section 802(h)(3)(C) of the Act to both the stepmother and the natural mother in equal shares. This respondent contends that those payments should be made solely to the stepmother, as the person who last bore the relationship of mother to the insured. This respondent confesses error to this extent in the decision of the lower courts.

3. That the lower court was justified in ordering the payment of the policy in 120 equal instalments in the absence of the election of any other method of payment by the beneficiary.

Argument.

I.

Benefit Instalments which Accrue during the Lifetime of a Deceased Beneficiary may be Paid to his Legal Representative.

This respondent contends that payments which accrued and should have been made to a beneficiary during the lifetime of the beneficiary should be paid to his representative after his death. The statute, 54 Stat. 1008 (38 U.S.C. c. 13, § 802), in its earlier form seems at first blush to indicate the contrary. Subsection (i) states: "The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments." Subsection (j) also provides: "No installments of such insurance shall be paid to the heirs or legal representatives as such . . . of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made" (as amended, Aug. 1, 1946, 60 Stat. 781).

The difficulty with a too literal reading of these words has been pointed out by the trial judge in this case, and by the Court of Appeals in *Baumet* v. *United States*, 177 F. (2d) 806. Unlike some other types of life insurance, these policies are intended to be paid in instalments over a long period of time, a minimum of ten years. The draftsmen of the Act realized that in many instances the beneficiary might die during the period. They made these obvious provisions to transfer the beneficial interest in the case of

such a death from the deceased beneficiary to the contingent beneficiary of the policy, or, if none, to the next survivor in the specified class of relatives. Apparently they did not visualize the possibility that is painfully present in the case at bar, namely, that a beneficiary might be alive for several years and might have made an appropriate claim, but because of the law's delay might yet die without ever receiving any portion of the instalments due. It may be pertinent to point out that this Act was passed in 1940, at a time of national emergency and without the extensive deliberations that preceded legislation in more normal times. See *Carpenter* v. *United States*, 168 F. (2d) 369, 371. After some experience with the administration of the Act, Congress amended this portion of the Act in 1946 (60 Stat. 783, 786).

It would certainly be utterly unfair to say that the Veterans Administration could, by holding up payments for years until the death of the last eligible beneficiary, force the escheat of all the proceeds of a policy. The equities are similar when, because of a bona-fide contest or other legitimate complications, a substantial delay occurs. It is submitted that the interpretation of the statute made by the Court of Appeals is correct. "To say the least it seems unlikely that Congress intended to pass legislation, particularly remedial legislation such as the Act under consideration, capable of producing such unjust, startling and capricious results" (*United States* v. *Henning*, 191 F. (2d) 588, 591).

To say that Congress would have further amended this provision in the Acts of 1951, Public Law 23, 82d Cong. 1st Sess., if it had intended no payments to administrators would be to ignore the interpretation by then put upon the Act in *Baumet* v. *United States*, 177 F. (2d) 806; cert. den. 339 U.S. 973.

II.

The Stepmother, Bessie, is the Parent who Last Bore that Relationship to the Insured.

It is clear that on the death of Eugene, the named beneficiary, his father, became entitled to the benefits of the policy. The effect of his father's subsequent death five months later has been discussed above. Clearly any payments accruing after Otto's death on December 8, 1945, could not go to the father or the father's representative as such. The statute, subsec. (h)(3)(C), provides that, in case of the decease of the named beneficiary, payments shall be made to certain classes of persons of whom the only possible ones involved in this case are "the parent or parents of the insured *who last bore that relationship*, if living, in equal shares." See 1942 amendment, 56 Stat. 657, 659.

Congressman Disney of Oklahoma explained this provision to his colleagues in debate as follows: "The third amendment places the parent who last bore that relationship in precedence over other parents; in other words, a person who stood in the relationship of loco parentis to the soldier for not less than a year immediately prior to his entrance into active service would take precedence over a natural parent" (88 Cong. Rec. 5932). And see S. Rep. 1430, H. Rep. 2312, 77th Cong., 2d Sess.

There is no doubt whatever, in point of fact, that Bessie, the sailor's stepmother, was *in loco parentis* and bore the relationship of mother toward him from the time he was fifteen years old until he was twenty-one, and indeed until he enlisted in the Navy. There is no doubt whatever that, as between Bessie and the natural mother, Bessie "last" bore the relationship. To rule otherwise is to make the word "last" in the statute utterly meaningless (*Baumet* v. *United States*, 191 F. (2d) 194; *Bland* v. *United States*, 185 F. (2d) 395). It also results in the absurdity of a person's having several mothers at once.

Consider, for example, the situation if Eugene had not designated his father as his individual beneficiary, but had died leaving it blank. On his death Otto and Bessie were living together in the place which the sailor thought of as home. They were clearly his parents and would take under subsection (h)(3)(C). But the ruling of the District Court (R. 22) would also include Clara as "first, last and all the time" a third parent, and would force a payment of one-third of the benefits to her simultaneously with the others. This would be an absurd and incongruous result, not contemplated or required by the language of the statute. See *Mansfield* v. *Hester*, 81 F. Supp. 772, 776; *Baumet* v. *United States*, 191 F. (2d) 194, 196; *Leyerly* v. *United States*, 162 F. (2d) 79, 85 (10th Cir.).

This respondent submits that the decision of the Board of Veterans Appeals (R. 18) was correct, that Bessie M. Henning alone was entitled to receive as beneficiary for the period December 9, 1945, to June 30, 1949, and the entire payments accruing under the policy during that period should be paid to her representative.

As to the further payments accruing after the death of Bessie in June 1949, this respondent makes no claim to those proceeds and has no interest in them. He would be content to see them paid to the adverse claimant, Clara, to avoid escheat, if that can be done under the statute. This was apparently allowed in the somewhat different case of *Strunk* v. *United States*, 80 F. Supp. 432, 435.

III.

The Court Properly Ordered Payments in 120 Monthly Instalments in the Absence of an Alternative Election by the Beneficiary.

When Eugene took out his policy, payments were designated to be made to any beneficiary over thirty years of

age in 120 monthly instalments. This was the original and the normal method of payment. The amendment of 1944 (58 Stat. 762) authorized the beneficiary to elect an alternative, a refund life income plan. This contemplates an affirmative act by the beneficiary in electing the alternative. If there is no such affirmative act, the normal payments are indicated. It is not questioned that all the possible beneficiaries were well over thirty years of age when the policy matured.

In the present case there is no record that Otto, Bessie or Clara have made such an election.

Under the circumstances they cannot complain that the court has awarded payments on the normal basis. Nor should the Government, which is supposedly a stake-holder, protest the manner of payments which is acceptable to the claimants.

This respondent submits that the Court of Appeals was correct in holding the election unnecessary and in sending the matter back for a more precise computation of the instalments.

ARTHUR V. GETCHELL,
Attorney for JOSEPH S. KENNEDY, Administrator, Estate of Bessie M. Henning, and Administrator d.b.n., Estate of Otto F. Henning, Respondent.

LLOYD, LEE & SHERMAN,
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Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 10.

UNITED STATES OF AMERICA,
Petitioner,

v.

CLARA BELLE HENNING ET AL.

PETITION FOR A REHEARING.

RICHARD H. LEE,
Attorney for JOSEPH S. KENNEDY, Administrator of the Estate of Bessie M. Henning and Administrator d.b.n. of the Estate of Otto F. Henning.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 10.

UNITED STATES OF AMERICA,
Petitioner,
v.
CLARA BELLE HENNING ET AL.

PETITION FOR A REHEARING.

Joseph S. Kennedy, Administrator of the Estate of Bessie M. Henning, and Administrator d.b.n. of the Estate of Otto F. Henning, respondents in the above case, represents that on Monday, November 17, 1952, this Honorable Court by a majority decision of the justices thereof reversed a decree of the United States Court of Appeals for the First Circuit, after having granted certiorari therefor on January 28, 1952; that at the time of the filing of said petition for certiorari the respondent Clara Belle Henning had died and the fact of her death was not known to counsel engaged in this case; that under Rule 19 of this Court said petition should have been abated until the appropriate representative of the Estate of Clara Belle Henning was made a party thereto.

Your petitioner believes that this drastic change in the circumstances of the parties, which was unknown to counsel and Court at the time of their opinion, changes the basis upon which said opinion was rendered and makes a new opinion appropriate.

WHEREFORE your petitioner prays:

1. That this Honorable Court grant the within petition for rehearing.

2. That this Honorable Court permit the substitution of the personal representative of the deceased Clara Belle Henning and abate the petition until such substitution has been accomplished.

3. For such other and further relief as to this Honorable Court may seem meet and just.

Respectfully submitted,

RICHARD H. LEE,

Attorney for JOSEPH S. KENNEDY, Administrator of the Estate of Bessie M. Henning and Administrator d.b.n. of the Estate of Otto F. Henning.

Certificate.

I, Richard H. Lee, counsel for Joseph S. Kennedy, hereby certify that the within petition for rehearing is presented in good faith and not for delay.

RICHARD H. LEE.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. NOVEMBER 26, 1952.

Personally appeared RICHARD H. LEE and made oath to the truth of the foregoing certificate; before me,

FRANCES K. LINDSTRUM,

Notary Public.